No. [redacted] 13

IN THE

Supreme Court of the United States

October Term, 1968

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL.,

Appellants

v.

ABERDEEN AND ROCKFISH RAILROAD COMPANY ET AL.,

Appellees

On Appeal From The United States District Court For The Eastern District of Louisiana, New Orleans Division

JURISDICTIONAL STATEMENT

EDWARD A. KAIER
1138 Six Penn Center Plaza
Philadelphia, Pa. 19103

JOSEPH F. ESHELMAN
1600 Three Penn Center Plaza
Philadelphia, Pa. 19102

RICHARD B. MONTGOMERY, JR.
806 National Bank of Commerce Bldg.
New Orleans, La. 70112

Attorneys for Appellants

CHARLES C. RETTBERG, JR.
JOHN J. NEE
J. T. CLARK
EUGENE E. HUNT
KENNETH H. LUNDMARK
KEMPER A. DOBBINS
ALLEN LESLEY
DANIEL LUND
MONTGOMERY, BARNETT, BROWN & READ
Of Counsel

December 1967

International, 711 So. 50th St., Phila., Pa. 19143—Tel. SA 7-8711 Area Code 215

SUBJECT INDEX

SUBJECT INDEX (Continued)

CITATIONS

Cases: Page

CITATIONS (Continued)

Statutes:

Reports:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No.

THE BALTIMORE AND OHIO RAILROAD COMPANY ET AL.,

Appellants

v.

ABERDEEN AND ROCKFISH RAILROAD COMPANY ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

JURISDICTIONAL STATEMENT

Appellants ("Northern lines") The Baltimore and Ohio Railroad Company et al., listed in Appendix E hereto (168a-170a),[1] appeal from the final decree of the United States District Court for the Eastern District of Louisiana, New

1. Figures with suffix "a" refer to pages of the appendices, *infra*.

Orleans Division, setting aside an order of the Interstate Commerce Commission entered upon further hearing in proceedings known as the *Official-Southern Divisions case.*

OPINIONS BELOW

The opinion of the District Court is reported in 270 F. Supp. 695 and is set forth in Appendix A hereto (1a-32a). The reports of the Interstate Commerce Commission are published at 325 I.C.C. 1 and 325 I.C.C. 449. These reports and accompanying orders are set forth in Appendix C hereto (37a-163a).

JURISDICTION

This action was begun by a complaint filed in the United States District Court for the Eastern District of Louisiana, New Orleans Divisions, under 28 U.S.C. §§ 1336, 1398, 2284, and 2321-2325 and Section 10 of the Administrative Procedure Act, 5 U.S.C. § 1009, subsequently codified as 5 U.S.C. § 706, praying that an order of the Interstate Commerce Commission be set aside. The final decree of the District Court, set forth in Appendix B hereto (33a-34a), was dated August 8, 1967, and was entered August 22, 1967. These appellants filed their notice of appeal in the District Court on October 2, 1967. The jurisdiction of this Court to hear this appeal is conferred by 28 U.S.C. § 1253. *New England Divisions Case,* 261 U.S. 184 (1923); *Baltimore & O. R. Co. v. United States,* 298 U.S. 349 (1936); *Chicago & N.W. R. Co. v. A., T.&S.F. R. Co.,* 387 U.S. 326 (1967).

STATUTES INVOLVED

Sections 1(4) and 15(6) of the Interstate Commerce Act, 49 U.S.C. §§ 1(4) and 15(6), and Sections 8(b) and 10(e) of the Administrative Procedure Act, now codified as 5 U.S.C. §§ 557(c) and 706, are set out in Appendix D hereto (165a-167a).

The provisions of Section 15(6) of the Interstate Commerce Act here most particularly involved, read:

> "Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, * * *. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge."

QUESTIONS PRESENTED

The District Court set aside orders (herein termed "order") entered by the Interstate Commerce Commission in proceedings held pursuant to Section 15(6) of the Interstate Commerce Act. The order found existing divisions of joint rates, for the carriage by rail of all freight (other than coal and coke made from coal) between Official Territory and Southern Territory, to be unjust, unreasonable, and inequitable and prescribed new divisions which the Commission found would be just, reasonable, and equitable for the future.[2] Over 200 railroads, respondents in the principal proceeding, were involved, but the case was tried by the parties and decided by the Commission as a controversy between two contending groups of rail carriers—Eastern (or Northern) railroads and Southern railroads. Having found all other elements requiring consideration to be in balance as between the two groups, the Commission prescribed the new divisions with reference to the relative costs of the services involved to the Northern and Southern lines. The District Court set aside the said order and remanded the cause to the Commission for further proceedings.

The questions presented are these:

1. Whether the District Court invaded the authority of the Commission in holding that the relative costs relied upon by the Commission, which it had found adequate, reasonably accurate, and reliable for the purpose, were insufficiently refined to support its prescription of new intergroup divisions, and that accordingly the Commission was obligated as a matter of law to develop more refined cost data described by the District Court as the "actual costs of handling the specific traffic at issue."

---

2. Official Territory is comprised of the area lying generally east of the Mississippi River and north of the Ohio River, and certain points in Virginia. Southern Territory lies generally east of the Mississippi River and south of Official Territory.

2. Whether, when the Commission in the exercise of its powers under Section 15(6) of the Interstate Commerce Act makes findings of relative costs on a fully-distributed basis for the purpose of prescribing just, reasonable, and equitable divisions of joint freight rates, it is required as a matter of law in determining such relative costs to consider only passenger expenses which would remain to be borne by freight service if passenger operations were discontinued, and whether there was any error prejudicial to the southern railroads in the Commission's treatment of passenger service deficits.

3. Whether the District Court improperly equated such overhead costs as are an integral part of fully distributed costs with general revenue needs and as a consequence erred in holding that the Commission having adopted a relative cost basis for determining fair divisions, acted without findings and substantial evidence in relying upon relative costs which reflected an appropriate proportion of the deficits from all passenger operations including suburban service.

4. Whether the District Court erred in remanding the cause to the Commission without retaining jurisdiction to require equitable resettlements of revenues received by the parties from interterritorial freight rates in the event of a further order of the Commission on remand.

STATEMENT

Proceedings Before the Commission

The order under review was made by the Commission upon further hearing in an investigation instituted by it in 1947 in which it originally prescribed "equal-factor" divisions for the Northern and Southern carrier groups. *Official-Southern Divisions*, 287 I.C.C. 497 (1953). The Commission there noted that if it were to give controlling weight to the cost studies of Northern lines for 1946 and 1948, the relatively higher divisions sought by those lines would be justified. But it did not accept them at face value because of certain important items of expense in those years which might reasonably be regarded as transient. It considered it to be the safest assumption for the future that neither group would have an appreciably lower basis of operating costs than the other, and that no other relevant circumstances of importance justified higher divisional factors for one group than the other (p. 526).

Upon Northern lines' petition, alleging that their costs had not declined to the level of Southern lines' costs, but had risen in relation thereto, the Commission, on July 29, 1959, reopened the proceeding for further hearing (39a-40a; JA 22, 51-52).[3]

Lengthy hearings followed in which both groups of respondents sought to prove that the Commission should fix relatively higher divisions for themselves (78a-81a). The hearing examiners found the then existing divisions unfair to Northern lines and recommended new divisions (40a; JA 53-137). Exceptions to their report and replies to such exceptions were filed by both parties, and the Commission heard them in oral argument (40a).

---

3. Figures prefaced with "JA" refer to pages of the Joint Appendix prepared at its order for the District Court, which is included with the record brought up on appeal.

The length of the hearings and size of the record reflect the substantial revenue involved and the importance of the case to the carriers. Southern lines' traffic study indicated that the annual volume of the North-South traffic involved amounts to over 967,000 carloads of freight, yielding an annual revenue of over $496,000,000 (47a).

To develop the relative service costs of the carrier groups in handling this traffic the parties basically employed the territorial Rail Form A costs for the year 1956 as prepared by the Commission's Cost Finding Section at the fully distributed level (67a).[4] Southern lines presented their cost studies in several forms, the last consisting of the territorial costs modified to include twelve adjustments they deemed necessary (65a). The Commission accepted certain of these adjustments and rejected others for reasons stated (106a-148a). Restating Southern lines' costs accordingly, the Commission found (67a):

> "Apart from the adjustments rejected in appendix B, our restatement is based on the southern lines' cost computation, as applied to their traffic studies, which, we find, more reliably and accurately reflect the movement of the traffic in question." (67a)

Concerning the restated costs, the Commission found (97a):

> "Our restatement of the costs, which are reasonably accurate and reliable for purposes of determining the relative contribution by the groups on a cost-of-service basis, shows that the cost level in 1956, the year both groups used in the final cost analysis, is somewhat higher in the North than in the South for like services. A consideration of all factors indicates that this situation will most likely continue in the immediate future."

---

4. "The sum of the out-of-pocket costs plus a pro rata distribution of the constant or fixed costs is referred to as fully distributed cost." *New York v. United States,* 331 U.S. 284, at 316 (FN 21).

The Commission considered all of the specified statutory factors and then determined that there were no differences between the groups of carriers with respect to those factors that indicated that either group was entitled to a share of the joint rates larger than that it would be entitled to receive on the basis of relative costs.

Southern lines asked the Commission to prescribe scales of divisional factors based upon costs, using the method adopted in *Louisville & Nashville R. Co. v. Southern Ry. Co.*, 319 I.C.C. 639,[5] and they pointed out that, to the extent that the Examiners were found to be correct in their rejection of specific aspects of the Southern lines' cost evidence, the cost evidence as thus modified would provide the basis for constructing the divisional scales (Southern lines' exceptions to recommended report, pp. 188, 189; JA 796). The Commission agreed; after accepting several of Southern lines' proposed adjustments and rejecting others, it prescribed the new divisions on the basis of Southern lines' cost evidence as thus modified, citing *Louisville & Nashville* (67-68a, 82a, 98-99a).

The Commission's ultimate findings were that just, reasonable, and equitable divisions should be determined by the use of percentages formulated on a relative cost basis.

Proceedings in the Court Below

On March 31, 1965, the Southern lines filed suit in the United States District Court for the Eastern District of Louisiana, New Orleans Division, praying that the order of the Commission prescribing the new divisions be enjoined and set aside. Contemporaneously, plaintiffs filed application for an interlocutory injunction and, if needed, a temporary restraining order. This resulted in the granting of a temporary restraining order, but following hearing before the three judges on plaintiffs' application for inter-

5. Sustained in *Carolina & Northwestern Ry. Co. v. United States*, 234 F. Supp. 112 (W.D., N.C. 1964) (Aff'd 380 U.S. 526).

locutory injunction, the temporary restraining order was dissolved and the application for interlocutory injunction was denied subject to conditions for refunding the money involved to Southern lines in the event they should be successful in permanently setting the order aside. As a consequence the newly prescribed divisions became applicable as of April 20, 1965, the effective date of the Commission's order (150a-151a).[6]

The District Court disregarded the findings of the Commission concerning the adequacy, reasonable accuracy, and reliability of the relative costs to the two groups of handling the traffic involved, on which the Commission had relied in prescribing the new intergroup divisions, and held such costs not a costing of the particular movements but insufficiently refined to support the Commission's order, and that accordingly the Commission was obligated to develop, or to require the parties to develop, more refined cost data described by the Court below as the "actual costs of handling the specific traffic at issue." The Court thereupon set aside the Commission's order and remanded the cause to the Commission for further proceedings. *Aberdeen & Rockfish R. Co. v. United States*, 270 F. Supp. 695 (1a-32a).

In its opinion, the court below—with obvious lack of appreciation of the years of work necessary to prepare traffic and cost studies of the completeness of those here of record, to say nothing of the more refined costings envisioned by it—suggested that the Commission make a new traffic study as well as a new study of costs which would meet the views of the court as to the "actual costs" of handling the specific traffic (29a-32a).

---

6. A modification sought by the Norfolk Southern, a Southern line, was granted by the Commission in its supplemental report dated May 18, 1965 (152a-163a). Except for such modification the order of May 18, 1965, merely affirmed in all respects the Commission's original order of February 3, 1965. The supplemental order requires no further discussion here.

Under the protective conditions attached to the District Court's denial of interlocutory injunction, which are carried forward by its order staying decree (32a), Northern lines would be obligated, in the event the Commission's order is permanently set aside, to resettle their accounts with Southern lines on all shipments made on and after April 20, 1965, with interest. By April 20, 1968, this would represent a principal amount of some $25,000,000 to be paid Southern lines by Northern lines.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The court below set aside the Commission's order because it disagreed with the Commission's appraisal of the voluminous evidence relating to the relative cost of service. The court held that the Commission erred in relying upon territorial costs determined in accordance with Rail Form A, which embodies formulas and directions prepared by the Commission's Cost Finding Section and normally used by the Commission in determining costs, and that the Commission could lawfully act only on the basis of what the court described as the "actual" costs of the "specific traffic" involved. In so holding the court disregarded the fact that the Commission had made detailed findings, which were supported by substantial evidence, explaining its reasons for relying upon the Rail Form A costs and rejecting certain adjustments in those costs proposed by the Southern carriers.

The court below in thus substituting its judgment for that of the Commission on matters that are peculiarly within the Commission's expert knowledge and competence has disregarded the standards for judicial review many times enunciated by this Court. Its decision if allowed to stand is likely to have consequences whose importance will transcend the particular issues here involved. Rail Form A was developed by the Cost Finding Section of the Commission for use in determining costs for a variety of purposes, and costs determined in accordance with that Form have been used by the Commission in resolving issues not only in divisions cases arising under Section 15(6) but also in rate cases arising under Sections 1, 3, 15(1) and 15(3) of Part I of the Interstate Commerce Act. Similar cost forms, i.e., Highway Form B and Barge Form C, have been developed and used by the Commission in resolving issues under comparable provisions in Parts II and III of the statute. The decision below by rejecting the

cost accounting methods and principles developed by the Commission's own experts and customarily used by the Commission in favor of an illusory and impractical concept of "actual cost" threatens to disrupt the Commission's administration of its statutory obligations.

Although the court below paid formal deference to the established standards of judicial review, its decision in fact rests on an assumption as to the function of the reviewing court which if applied generally would mean that the technical problems involved in determining transportation costs would not be determined uniformly by the expert judgment of the agency charged with the administration of the National Transportation Policy but rather by the varied views of the numerous District Courts which have jurisdiction to review Commission orders.

In addition this case is in itself sufficiently important to warrant plenary review of the District Court's departure from the accepted standards of judicial review. As previously indicated, the District Court's decision, if not reversed, would require a cash payment of some $25,000,000 by the railroads of the northeastern part of the country, which includes some of the most necessitous carriers in the nation, to the Southern lines, and an immediate reduction in the divisions of the former by $8,000,000 per year, at least until the Interstate Commerce Commission could undertake a new investigation, in a futile search for "actual costs", which would consume an additional four or five years at the least.

I.

The District Court's Condemnation of the Adequacy of the Relative Costs Relied Upon by the Commission Would Seriously Impair Its Ability to Administer the Interstate Commerce Act.

A. *The Form A Territorial Costs Used by the Commission Were Here Properly Relied Upon by the Commission.*

The proceeding before the Commission was one of great scope. At issue was the reasonableness of the divisions of the joint rates on all commodities except coal and coke between every station on all railroads of the North and every station on all railroads of the South. Although the Southern lines advocated certain adjustments therein, they, like the Northern lines, basically relied upon the territorial unit costs, as developed under the Rail Form A formula by the Commission's Cost Finding Section, for the Northern and Southern groups of railroads. The Commission acted on the basis of the Southern lines' cost evidence, as restated by it to include certain of the Southern lines' adjustments and to exclude others (65a-69a, 97a). The validity of using Form A territorial costs in a case of this scope was clearly indicated by numerous facts now to be summarized.

(1) The Commission in discussing and relying upon Form A territorial costs as first presented to it in *Class Rate Investigation, 1939,* 262 I.C.C. 447, 693 (1945) found:

> "There are different degrees of refinement in costs depending upon the purposes for which the costs are intended. The ascertainment of the costs of transporting a particular commodity over a single railroad or a group of roads, for instance, obviously requires more refinement in procedure than the calculation of

relative costs for transporting all traffic, or important and well-defined segments of traffic, by territorial groups of carriers."

This decision was upheld by this Court in *New York v. United States,* 331 U.S. 284 (1947) wherein the Court, after due regard to the data based upon Form A territorial costs and the conclusions of the Commission with respect thereto (315-332), sustained the Commission's order. The Court was well aware that while the costs on which the Commission acted were territorial unit costs, the orders involved "affect class rates and class rates alone" noting also that ". . . this proceeding pertains only to class rates, which move but a small percentage of the traffic" (331 U.S. at 330 and 343).[7]

(2) The Southern lines themselves basically used the Form A territorial unit costs. Indeed, some 89.45% of the total North-South costs attributed by those lines to the traffic involved were unadjusted Form A territorial averages, the adjustments which they advocated accounting only for 10.55% of the total.[8] The Commission acted upon the cost evidence submitted by the Southern lines, saying "Apart from the adjustments rejected in appendix B, our restatement is based on the southern lines' cost computation, as applied to their traffic studies, . . .". (67a).

(3) Northern lines' evidence showed that the North-South traffic is handled as an indiscriminate part of the whole and that territorial costs properly show the cost

7. Carload traffic moving at class rates in the United States was shown in *Class Rate Investigation, 1939,* 262 I.C.C. 447, 479, as 4.1 percent of the total carload traffic. The present record shows Northern lines' former revenues from the North-South traffic as constituting 6.0% of their total revenues and Southern lines' revenues from this traffic to have constituted 21.4% of their total revenues (19a; JA 535-536). Combining the figures the total North-South revenue on the traffic in issue represents 10% of total revenues of Northern and Southern lines (V.S. 36, Ex. 5).

8. Computed from Southern lines' Verified Statements 40 and 40-A (J.A. 594-600).

of performing the service on the North-South traffic (V.S. 8).[9]

(4) The cost evidence used in the 1953 case in which the original divisions were prescribed was based upon Form A territorial costs (287 I.C.C. 497, 507, 526).

(5) The evidence shows that Southern lines have employed Form A territorial unit costs in cases of far less scope than the present (V.S. 80, Sec. H; JA 656-660). One of the principal Southern lines employed such costs (with minor adjustments) in a current divisions case, *Illinois Central R. Co. v. Great Northern Ry. Co.*, I.C.C. No. 34699 (unreported, recommended report and order of Oct. 27, 1966 adopted, with inconsequential changes, by Division 2 of the Commission on July 31, 1967). There it was stated that the defendant criticized the Illinois Central's use of Rail Form A as not tending to disclose the cost of handling the traffic in issue because, it urged, the formula is designed to portray broad, territorial costs. The case involved but one commodity. The Illinois Central was sustained. It was stated in the report that costs determined in a similar manner have been relied upon in other divisions cases involving a single commodity, citing a case involving two other prominent Southern railroads—each of which relied upon Form A costs with certain adjustments—(*Louisville & N. R. Co. v. Southern Ry. Co.*, 319 I.C.C. 639, sustained in *Carolina & Northwestern Ry. Co. v. United States*, 234 F. Supp. 112 (W.D., N.C. 1964), affd. per curiam, 380 U.S. 526 (1965)).

The insistence of the Court below (30a) that the Commission was required to determine the "actual costs" of

---

9. Under the special rules of practice the Commission prescribed for this proceeding virtually all direct evidence was presented in verified statements with the witness being subject to cross-examination. Verified Statement No. 8, Witness Nancarrow, and two of its 16 exhibits are reproduced at JA 312-340.

"the specific traffic" involved sets up a standard that is illusory and impractical. Any given shipment or category of shipments uses terminals in common with other shipments, is handled by the same switching crews, moves over track and in trains maintained and operated for all traffic and in cars and by locomotives that are repaired in central shops. Of necessity, any shipment's cost is an apportionment of expenses incurred in providing and maintaining facilities and conducting operations.[10] Form A classifies the expenses of the railroads and reduces them to a unit basis by dividing the various classes of expenses by appropriate statistics, such as cars originated, tons, ton-miles, etc. This produces a cost per ton for some services, and costs per car-mile, per ton-mile or for other service units for other services, depending upon which unit is most appropriate. These unit costs are then applied to the units of service involved in the particular traffic, here the North-South traffic, which units are ascertained by making a traffic study. This application of the unit costs to the number of service units involved results in the apportionment of the railroads' unit costs to the exact units of traffic involved in the case at hand.

B. *The Holding of the Court Below Would Seriously Impair the Commission's Ability to Administer the Interstate Commerce Act.*

A particularly damaging aspect of the District Court's decision, obviously growing out of its unfamiliarity with matters of common carrier costs and administrative requirements, is the substantial extent to which the principle of its holding would cripple the ability of the Commission to administer the Interstate Commerce Act in proceedings in which cost data are customarily presented. The Court below has held that Form A territorial unit costs, as modified by the adoption of five adjustments advocated by

10. The practical impossibility of securing "actual" rail costs is recognized in *New York v. United States*, 331 U.S. 284, 328, 335, and note 33.

Southern lines, did not constitute substantial evidence of the cost of the service involved in this case, which deals with transportation of virtually all commodities, over all railroads, between every station in the North and every station in the South.

Aside from the substantial inaccuracy and inadequacy of the court's statement that the Form A formula was designed to measure the cost of handling all traffic and aside from the court's misapprehension of the nature, reliability, and significance of costs developed thereby for particular traffic, of which opportunity to file briefs on the merits would permit demonstration, it is here noteworthy that this holding leaves nothing to the discretion of the administrative body. The court below thus holds as a matter of law that territorial or regional unit costs applied to the specific service units of a particular traffic cannot be accepted by the Commission in arriving at its "opinion" (49 U.S.C., § 15(6)) that existing divisions are unreasonable and its prescription of fair and equitable divisions on that traffic "without further evidence". But since the instant record contains such further evidence (e.g., V.S. 8 which, with two of its 16 exhibits is reproduced in JA 312-340), which the Court below noted (19a, n. 12) but disregarded, and since it likewise disregarded the adjustments of the Form A costs which Southern lines proposed and the Commission accepted and incorporated into the unit costs it employed and relied upon, the holding becomes a virtually absolute condemnation of the use or acceptance of relative costs for particular traffic—albeit important segments of traffic by territorial groups of carriers—based laregly on the application of regional unit costs to the service units of such specific traffic. This holding is central to the court's decision.

In terms the opinion of the court below on this point refers to "a divisions case" (24a), but the principle announced is broad enough to relate to other types of issues before the Commission and to other types of carriers. Thus, the Rail Form A formula is but one of the formulas

developed by the Commission's Cost Section for the determination of costs of common carriers subject to its regulation; others including Highway Form B and Barge Form C. The Cost Section has prepared numerous studies of regional cost data for both rail and motor common carriers.[11] The wide use and acceptance of these studies is indicated by the Commission in its Annual Report to the Congress for 1961, at page 153, and in that for 1957, at page 108.

Were the decision of the court below to stand as to the legal inadequacy of rail costs ascertained by the application of territorial unit costs to the specific service units of the vast interterritorial traffic here involved, the same principle would apply with greater force where the particular traffic was of lesser volume and scope, and it would also apply to the use of regional costs developed by the Commission's Cost Section for other types of carriers in determining costs on their particular traffic. No such result or possibility of result should be permitted without plenary consideration of the nature and scope of the holding below.

C. *The Decision Below Misconstrues and Is Inconsistent With, Chicago & N.W. R. Co. v. A.T.&S.F. R. Co., 387 U.S. 326 (1967).*

That the District Court misapplied and misconstrued this Court's decision in *Chicago & N.W.R. Co. v. A.T.&S.F. R. Co.*, 387 U.S. 326 (1967) would seem beyond dispute. There, in sustaining an order by which the Commission prescribed interritorial divisions between Midwestern and Mountain-Pacific railroads, this Court considered and rejected contentions similar to those successfully advanced, through the same principal counsel, by Southern lines in the present proceeding. The District Court in the present case referred to *Chicago & N.W.R. Co.*, and stated that:

11. See, for example, I.C.C. Annual Reports: 1949, p. 76; 1950, pp. 71-72; 1955, pp. 71-72; 1957, p. 107.

"There, the Commission based its cost findings on a special cost study and analysis prepared by the Mountain-Pacific carriers and made certain adjustments which it considered more accurately reflected the true costs of the traffic involved. These adjustments (3) were derived from Rail Form A. The Supreme Court held that the attack on the legal validity of these adjustments to costs were unsubstantial. Here, of course, the entire inflation is pegged on relative costs derived from Rail Form A." (25a-26a)

Thus, the District Court construed *Chicago & N.W.R. Co.* as involving Form A costs only to the extent of three adjustments. The fact is that there, as here, the basic cost study upon which the Commission relied was predicated upon Form A territorial averages, with certain adjustments advocated by Appellees (Mountain-Pacific lines) being allowed by the Commission and others rejected. This is clear from the Commission's decision which was sustained in that case. *Akron, C. & Y. R. Co. v. Atchison, T. & S.F. R. Co.*, 321 I.C.C. 17, 29-53; 322 I.C.C. 491, 492-499. Indeed the Commission concluded in that case that ". . . for a large and varied body of traffic as here at issue, territorial average costs will be the substantial equivalent of specific costs" (p. 50).

The cost issues in *Chicago & N.W.R. Co.* and those involved here are so similar in character that the intervenors in the instant case—Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners—obtained leave to file a brief as *amici curiae* in the appeal in *Chicago & N.W.R. Co.* in order to present to this Court their contention that the cost issues in that case should not be decided by the Supreme Court, lest such a decision govern the decision of the District Court in the instant case. They stated in their *amici* brief of April 5, 1967, to this Court:

"However, the Commission's cost findings in the *Official-Southern* case reflect the very same approach that

it used in the *Transcontinental* case. There, as here, although the asserted basis of its action was 'the relative costs of the parties reflecting their respective operations as to this traffic' (325 I.C.C. at 50; see also 325 I.C.C. at 26, 56), the Commission relied almost exclusively upon the average costs of handling all traffic in these territories in reaching its conclusions. And there, as here, virtually every objection to reliance upon such territorial averages was brushed aside without either findings or evidence to support such action."

Likewise, the Mountain-Pacific lines in their memorandum of August 16, 1967, in support of a motion to the California District Court to clarify a passage in its decision (which was reversed in *C. & N.W.*) relating to the cost issues, stated, at page 14:

"The decision in the *Official-Southern Divisions* case is especially relevant here since that case, like this one, involved the use by the Commission of Rail Form A territorial averages to measure the actual costs of handling particular traffic."

It is clear, therefore, that the basic cost evidence upon which the Commission relied in *C. & N.W.*—and not just a few adjustments therein—was made up of territorial unit costs based upon Rail Form A, and that the District Court in the present case misconstrued *C. & N.W.* in its attempted distinction thereof. In contrast to the District Court's substitution of its judgment for that of the Commission on the representative nature of those costs and the need for greater refinement, the Supreme Court in *C. & N.W.* applied the usual rule of judicial review by accepting the Commission's judgment on accounting problems which the Court said "concerned matters relating entirely to the special and complex peculiarities of the railroad industry." (387 U.S. 326, 356).

II.

The Decision of the Court Below Exceeds the Bounds of Appropriate Judicial Review.

After a comprehensive review of the cost evidence (58a-69a, 106a-148a), the Commission concluded that Southern lines' territorial costs as restated by it "adequately reflect the costs attributable to the traffic at issue" (68a-69a), and "are reasonably accurate and reliable for purposes of determining the relative contribution by the groups on a cost-of-service basis, ..." (97a).

Going far beyond the limited task assigned to it, the District Court substituted its judgment for that of the Commission and declared that the costs relied upon by the Commission—which were based upon its restatement of Southern lines' adjusted territorial unit costs as applied to the service units of Southern lines' most complete traffic study—were not sufficiently refined to sustain its order prescribing divisions. It stated this conclusion in terms of lack of substantial evidence and of findings, but this asserted lack relates only to the difference between the Court's views and those of the Commission as to the adequacy of the costs used.

In so deciding, the Court below acted directly contrary to pronouncements of this Court with respect to the judicial review of cost evidence. Typical of this is *Illinois Commerce Commission v. United States*, 292 U.S. 474, 481 (1934):

> "Whether or not the cost study was representative, whether the study should have been more refined, and whether it should have been supplemented as appellants desired, are questions of fact, the determination of which is within the competence of the Commission. The Commission reached its conclusion after full hearing and thorough consideration of all questions presented. As the record affords a sufficient basis for the Commission's determination, it is not subject to review in the courts . . ."

See also *New York v. United States,* 331 U.S. 284, at 328, 331, 335, and note 33 (1947), where this Court was considering the Commission's initial reliance on Form A costs in *Class Rate Investigation, 1939,* 262 I.C.C. 447 (1945).

It would not be appropriate here to discuss each of the cost adjustments proffered by the Southern lines and rejected by the Commission, but an indication of the serious error into which the District Court fell in failing to follow such precedents as *Illinois Commerce Commission v. United States, supra,* may be gained by reference to several of those proposed adjustments which were specifically the subject of the Court's findings.[12]

The first which may be noticed is the Court's finding that the Commission's use of territorial averages for switching costs "rather than the specific costs" incurred with respect to North-South traffic, is not supported by reasoned findings or substantial evidence (31a). The adjustment of switching costs proposed by Southern lines purportedly was made to eliminate the effect of volume switching, i.e., the switching of multiple cars in a single unit, it being the Southern lines' contention that they had relatively more such cars moving within the South than the Northern lines had moving within the North, and that consequently the effect thereof should be excluded in determining the switching minutes (and, therefore, cost) applicable to the interterritorial traffic involved.

The Commission found that:

---

12. The District Court stated (11a) that it is uncontroverted that most elements of costs are no higher on Northern than on Southern railroads and that (19a) seven items account for the "entire inflation" of Northern costs over those of Southern lines. In fact, these statements were controverted (Brief for Intervening Defendant Railroads, p. 50, fn. 9). They are shown to be erroneous, for example, by the evidence showing higher wages on Northern than on Southern lines. Wages constitute the largest item of railroad expense. If Northern lines had the same wage levels as Southern lines, their total wage costs in 1956 would have been almost $58,000,000 less than they actually were (V.S. 80, Sec. F) (J.A. 644-654).

"Territorial average costs are particularly appropriate to the traffic in this case because it is a large and varied body of traffic moving to and coming from terminals in all parts of both territories" (140a), that the depressing effect of the switching of volume movements would be largely offsetting as between the two territories (140a), that the Southern lines' studies of switching within the South had weaknesses, both in the sample and in the studies themselves (140a),[13] and that Southern lines' switching adjustment within the North was not made on a basis comparable to that which they used within the South (140a). For these reasons the Commission concluded that Rail Form A territorial average switching costs more accurately measure the relative switching costs of the Official-Southern traffic than the switching costs computed by the Southern lines (140a).

The presence of "reasoned findings" and of substantial evidence in support of the Commission's conclusions concerning the Southern lines' proposed switching adjustment and the use of territorial average costs is clear (132a-140a). The District Court's conclusion to the contrary is based purely upon the substitution of its judgment for that of the Commission on the question of whether the territorial switching minutes are representative for use here or whether they should be more refined (23a-25a).

The Southern lines' adjustment for empty return ratios on box cars was also specially mentioned by the District Court as illustrative of what the Court called the Commission's general approach (22a). Without examining the Commission's discussion of this complex matter or making any review of the evidence, the Court quoted from the opinion of the single dissenting Commissioner (who agreed

13. The evidence offered by the Southern lines with respect to switching within the South was based on a study of but 41 cars, out of a total North-South movement of 967,000 cars. The Southern lines' sampling expert declined to characterize the 41 car sample as representative (Tr. 1580-1582). Moreover, the sample did not consist only of North-South traffic, and there were other defects in the study (132a-140a).

that Northern lines should have an increase in divisions, but not as much as the Commission allowed), and announced, as a conclusion of law, that the use of territorial average empty return ratios rather than the "actual empty return ratios for the North-South traffic in issue" was unsupported by reasoned findings and not based upon substantial evidence (31a).

The Commission discussed the empty return ratio adjustment fully (120a-129a). The proposed adjustment with respect to box cars was made by Southern lines in three steps. The Commission found, with respect to the first step, that the adjustment was "not adequately supported" and was, at best, "merely illustrative", that the adjustment for the second step "is in error" and that the third adjustment was "purely an unsupported assumption" (127a). Its conclusion as to the empty return adjustment was that ". . . the empty return ratios for both boxcars and refrigerator cars developed by the special studies of the southern lines are not as sound an estimate of the empty return incurred by the official-southern traffic as are the 7-day study territorial empty return ratios. The latter reflect the compilation of actual data reported by the railroads on a comparable basis in each territory under an order of this Commission".

It is manifest that the Commission made reasoned findings in support of the empty return ratios which it used.

The third adjustment to which the District Court specifically adverted was that regarding deficits from commutation service. This will be discussed below. At this point it should be noted that, in essence, the District Court simply disagreed with the Commission on the question of whether the territorial unit costs, as restated by it, were representative for use as a guide for the determination of relative contributions by the two groups of carriers in the transportation of North-South traffic. The Court found that the Commission took no independent action to require "the development of more refined cost data" (11a), and it con-

cluded that the Commission has a duty to use its powers to obtain cost evidence where such evidence is necessary to assure an adequate record (30a). The Commission, to whom is committed the duty of decision on this matter, found the cost evidence upon which it acted to be adequate, reasonably accurate, and reliable for purposes of determining the relative contribution by the groups on a cost-of-service basis. This conclusion was sustained by substantial evidence; and the Commission had no duty to require the development of other evidence to supplant that which it found satisfactory. Such a duty could not be created by the lower court's substituting its judgment for that of the Commission as to the necessary degree of refinement in the cost evidence. *Illinois Commerce Commission v. United States, supra.*[14]

III.

There Was No Error in the Commission's Treatment of Passenger Service Deficits.

The Northern lines excluded the entire amount of both Northern and Southern passenger deficits in their opening cost evidence (62a). The Southern lines objected to this, saying that the Cost Finding Section's application of fully-distributed costs includes the deficits and the allowance of a 4% return on the property devoted to the serv-

14. In Finding No. 7 the Court stated that the "typical evidence rule" requires evidence typical in character and ample in quantity with respect to the divisions and services performed under the particular rate being divided, and that the Commission must consider evidence of actual services performed on particular traffic involved. By the Southern lines' own representation, which was agreed to by the Commission, there was the best evidence of actual services on the particular traffic involved of any ever submitted in a divisions case (43a-44a, 50a). The disagreement of the Court as to the representative character of the costs applied by the Commission has been shown in the discussion of this point to be erroneous and beyond the scope of judicial review. The Court cannot acquire authority to substitute its judgment for that of the Commission by invoking the phrase "typical evidence rule", and that is all it has done here.

ices. They concluded that Northern lines' study "is defective in computing constant costs without consideration of passenger deficits . . .". (So. Lines Br. before I.C.C., pp. 117-118, 120).[15]

Although the inclusion of passenger deficits was to the advantage of Southern lines (because their deficits are relatively greater than those of Northern lines) the position of Northern lines was that they would have no objection to the Commission's including the deficits or excluding them, but that they would object to the selective approach advanced by Southern lines under which Northern lines' deficits from suburban operations would be excluded, while all of the Southern passenger deficits (excepting only the suburban deficits of Illinois-Central) would be included, in ascertaining the relative cost to the two groups of carriers in performing the service involved.[16]

The Commission included a pro rata portion of the entire passenger deficit, basing its figures upon the cost evidence submitted by Southern lines before the exclusion of suburban deficits by them.

Upon oral argument in the court below, the Southern lines admitted that they did not challenge the Commission's power to include suburban deficits and that they did not attack the Commission's consideration of such deficits from the standpoint of "policy" and, indeed, they admitted that deficits from suburban service might be considered, but only, they said, to the extent that they result from the apportionment of common costs (Tr. 34, 31).

---

15. The Commission recognizes that ". . . the railroads' passenger train deficit, until it can be eliminated, is in a sense a part of their overhead burden to which the freight service must make some contribution", *Railroad Passenger Train Deficit*, 306 I.C.C. 417, at p. 479 (1959).

16. The court below (20a) said that "through the use of average costs", passenger deficits were included in the cost computations. It was not through the use of average costs that such deficits were included, but through the insistence of Southern lines that they be added, along with other overheads.

The District Court found that the Commission erred in including suburban deficits because, it said, there was neither finding nor evidence to relate such deficits to the Commission's standard for decision, i.e., the relative cost of performing the North-South freight service involved (22a, 30a). The fact is, of course, that it is in the very nature of overhead, or constant costs, that they are not incurred in the performance of the service to which they are apportioned. *New York v. United States,* 331 U.S. 284, 316 (1947). But the District Court dismissed the Northern lines' point that these costs are treated as overhead, or constant costs, the allocation of which is required because of the need for revenue from the freight service to continue operations. It said that the Commission did not so treat them, it having rejected contentions of both Southern and Northern groups for divisions over and above the cost of service on the ground of revenue needs (21a).

The Court plainly erred in this holding. Each group had contended before the Commission that in fixing the divisions the Commission should include an additive—over and above divisional shares based upon fully-distributed costs—for their general revenue needs. In rejecting these contentions, the Commission made this finding, which was ignored by the District Court:

> "However, our prescription of divisions based on relative costs includes allowances for overhead and return, and in our judgment reflects a due proportion of the burden of maintaining the financial integrity and credit of the carriers involved. *Cf. New England Divisions,* 66 I.C.C. 196, 199. Accordingly, we see no justification at this time for adding any special increment favoring one group of carriers over the other." (98a)

The failure of the court to take note of that finding and to understand that by their very nature constant costs

are not directly related to particular traffic led it to decide, erroneously, that there was no finding rationalizing the conclusion that the suburban deficits reflecting some costs not common to freight service but solely related to suburban service, should be treated "as cost of North-South freight traffic" (22a).

It should also be noted that the court's holding that the Commission could consider only those expenses of performing commutation service which are common to freight and passenger has no basis in the practice of the Commission or the decisions of this Court. Contrary to the lower court's assumption, the basis for giving effect to passenger deficits in determining freight rates is that both services are important and that the freight must help to support the passenger when the revenue from the passenger service is insufficient, not any notion that the deficit results from the apportionment of common expenses which would remain if passenger service were discontinued. *King v. U.S.*, 344 U.S. 254 (1952); *Chicago, M. St. P.&P. R. Co. v. Illinois*, 355 U.S. 300, 307 (1958); *Public Service Commission of Utah v. U.S.*, 356 U.S. 421, 426 (1958); *Increased Freight Rates, 1948*, 276 I.C.C. 9, 32-39.[17]

In this connection it should be noted that the Commission found against Southern lines on a basic factual premise of their suburban deficit point. They had argued that this deficit could be eliminated by the discontinuance of commutation service, on the premise that suburban facili-

17. The lower court said that it is "generally agreed" that intercity passenger deficits should be considered as a part of the cost of providing freight service because such deficits are usually the product of costs allocated to passenger operations from common facilities which must be maintained to provide freight service (20a). That statement on this complex matter is the court's, not that of the Commission. Indeed, in *Railroad Passenger Train Deficit*, 306 I.C.C. 417 (1949), the Commission considered contentions that passenger deficit figures are fictitious because of alleged shortcomings in its accounting rules and it found that evidence indicating the contrary "is of major significance and serves as a warning that common costs cannot be lightly dismissed" (pp. 415, 426).

ties are maintained solely for such service and are not used for freight or intercity passenger service (142a). After considering this contention the Commission determined that although many individual items of suburban service can be considered solely related to that service the facilities and service as a whole cannot be considered solely related to suburban service and treated entirely apart from the freight service and intercity passenger service. It concluded, therefore, that the suburban deficits should not be excluded from the constant costs (143a). The District Court took the view that the Commission was required "to determine how much of the railroads' cost of commuter service was in fact common with the cost of freight service and how much was solely related to commuter service." (21a) But, the Commission having found that the commuter service and facilities "considered as a whole" could not be regarded as solely related to suburban service, it was reasonable for it to treat the costs as it did—i.e., in exactly the same manner as it treated the costs of all other passenger services. Clearly it was within the Commission's administrative competence to do so.

It is important to note that Northern lines' entire passenger revenues exceeded the expenses that are solely related to the performance of passenger service as a whole and that they had a deficit only when a portion of the common expenses was assigned to the passenger service, but that this was not true of Southern lines (142a). In the calculation of the cost of the North-South service, therefore, the net result of the Commission's action was to allocate to the Southern lines a pro rata share of a deficiency of solely related passenger expenses under passenger revenue as well as the additional deficit resulting from the allocation of common expenses to the passenger service, while the passenger deficit included for the Northern lines resulted from the apportionment of common expenses alone.

Overall, therefore, the lower court's view (that it was proper to apportion to the freight service only that part of

the passenger deficit which resulted from the allocation of common expenses) was actually met as to the Northern lines but not as to the Southern lines.

The District Court (22a) quoted from this Court's decision in *Chicago & N.W.R. Co. v. A.T.&S.F. R. Co., supra,* to the effect that while the Commission has sometimes offset passenger deficits in freight rate cases, the issues are different when, in a divisions case, it is argued that carriers in one part of the country should subsidize the passenger operations of carriers elsewhere, that if the Commission were to give controlling weight to passenger deficits in a divisions case, it might be appropriate to take more evidence and discuss it in greater depth than the Commission did in that case, but that in the light of the fact that there the passenger deficits were of negligible relevance to the Commission's decision, there were no errors that would justify setting aside the order there involved.

In the present case, of course, it was at the instance of Southern lines that the Commission included passenger deficits in determining the relative costs upon which it acted. If it had not considered passenger deficits, the Northern lines' share of the costs and, therefore, its prescribed divisions, would have been relatively greater than those the Commission prescribed. The inclusion of passenger deficits, therefore, may be said to have resulted in Northern lines subsidizing Southern lines.

From the foregoing, it will be seen that there clearly was no error prejudicial to the Southern lines in the Commission's consideration of passenger deficits.

IV.

Even If the Decision of the District Court Were Otherwise Correct, It Erred in Remanding the Case to the Commission Without Retaining Jurisdiction to Require Equitable Settlements in the Event of a Further Order of the Commission.

In the *C.&N.W.* case this Court referred to the fact that thirteen years had elapsed since the complaints which gave rise to that litigation were first filed and it then held that the attacks on the Commission's cost findings were so insubstantial that no useful purpose would be served by further proceedings in the District Court.

Approximately eleven years have elapsed since the Northern lines petitioned for the reopening of this proceeding on November 2, 1956. In contrast to the concern of the Supreme Court regarding the time consumed in the disposition of *C.&N.W.*, the District Court here concluded its decision not only by ordering the case back to the Commission for the development of the "actual costs of handling the specific traffic at issue" (30a) but it suggested that the evidence upon which the Commission acted had become stale and that the reception of new evidence was in order (32a).

Although no party, either before the Commission or the Court below, made any suggestion of staleness in the record, although Southern lines' brief to the Commission represented their traffic study to reflect the normal annual movement of the traffic involved (43a), and although the Commission had found that the somewhat higher cost level in the North will "most likely continue in the immediate future," (97a) the Court below is here suggesting to the Commission, in substance, that it start all over again, with new evidence and new traffic studies, the development and decision of which takes years. This, itself, would be a substantial denial of justice and would be greatly to the detriment of that portion of the national transportation system

which serves the most populous section of the country and which has already been deprived during many years by litigation before the I.C.C. of revenues which the expert body found it should have. Moreover, it would greatly enlarge the injurious effect upon Northern lines that would flow from setting aside the Commission's order.

As previously stated appellants would be obligated, in the event the plaintiffs are successful in permanently setting aside the order of the Commission, to refund to Southern lines an amount which by April 20, 1968 would represent some $25,000,000 plus interest. At the same time the old divisions would be reinstated, at an annual cost of $8,000,000 to Northern lines.

Under Section 15(6) the Commission is without authority to prescribe divisions retroactively except in circumstances not here present. *Brimstone R.R. Co. v. United States,* 276 U.S. 104, 117-123 (1928); *United States v. Baltimore & Ohio R. Co.,* 284 U.S. 195 (1931). Accordingly, such further order prescribing divisions as the Commission might enter following a remand would of itself have force only prospectively from its effective date. Thus, whether or not the Commission's new order made any change in its original prescription, it would lack power to protect these appellants for the entire period of years from April 20, 1965 to the effective date of its new order. Since there is nothing of record to suggest, and the Court below found nothing to warrant any inference, that development of the more refined costs it deemed essential would at all warrant lower divisions for Northern lines than those prescribed in the order under review, an additional loss to Northern lines, at the rate of some $8,000,000 per annum for all years prior to the effectiveness of a new Commission order, may reasonably be assumed.

In this situation if there were any justification for remand, which there is not, the rights of the parties should have been protected by a reservation of jurisdiction by the District Court to make such further orders as might be proper.

CONCLUSION.

For the foregoing reasons probable jurisdiction of this appeal should be noted and the case set down for full hearing on the merits.

Respectfully submitted,

CHARLES C. RETTBERG, JR.
Baltimore & Ohio RR.
Baltimore & Ohio Bldg.
Baltimore, Md. 21201

JOHN J. NEE
Boston & Maine RR.
150 Causeway Street
Boston, Mass. 02114

J. T. CLARK
Erie-Lackawanna RR.
Midland Bldg.
Cleveland, O. 44115

EUGENE E. HUNT
New Haven Railroad
54 Meadow Street
New Haven, Conn. 06506

KENNETH H. LUNDMARK
New York Central System
466 Lexington Avenue
New York, N. Y. 10017

KEMPER A. DOBBINS
Norfolk & Western Ry.
Roanoke, Va. 24011

ALLEN LESLEY
Reading Company
Reading Terminal
Philadelphia, Pa. 19107

DANIEL LUND
MONTGOMERY, BARNETT,
BROWN & READ
806 Natl. Bank of
Commerce Bldg.
New Orleans, La. 70112
Of Counsel

EDWARD A. KAIER
1138 Six Penn Center Plaza
Philadelphia, Pa. 19103

JOSEPH F. ESHELMAN
1600 Three Penn Center Plaza
Philadelphia, Pa. 19102

RICHARD B. MONTGOMERY, JR.
806 National Bank of
Commerce Bldg.
New Orleans, La. 70112
Attorneys for Appellants

December 1967

APPENDIX A

Opinion of the District Court

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

No. 15454

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL.,

Plaintiffs

v.

THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION,

Defendants.

Before WISDOM, *Circuit Judge,* and HUNTER and WEST, *District Judges.*

HUNTER, *District Judge:*

This is an action to set aside and enjoin in part the order of the Interstate Commerce Commission (Commission) in Docket No. 29885,[1] *Official-Southern Divisions,* 325 I.C.C. 1 and 325 I.C.C. 449, which prescribed divisions of

1. Also embracing No. 29799, Akron, Canton & Youngstown R.R. Co., et al. v. Aberdeen & Rockfish R.R. Co., et al.

joint-rail rates on freight traffic moving between Official and Southern territories.[2]

Freight traffic between the North and the South moves on joint rates which are established when two or more carriers publish a single charge to be paid by the shipper for carriage from the originating point on one line to a destination on another. The proportion of the joint rates which each line receives as its share is called a "division" which is normally determined by agreement among the participating carriers. Prior to the orders of the Commission in this proceeding, the primary divisions accruing from Official-Southern traffic were made under an equal-factor scale prescribed by the Commission itself in its 1953 decision in Docket No. 29885 (officially reported at 287 I.C.C. 497). This decision followed the landmark decision of the Commission in *Class Rates Investigation, 1939,* 262 I.C.C. 447 (1945), wherein the Commission found that the higher rate level which was at that time applicable to the movement of rail freight in Southern territory, constituted an unlawful discrimination against the South.[3] In the *Class Rates* proceeding, the Commission ordered the discriminatory class rate structure eliminated and replaced with a uniform rate structure to be applicable throughout the United States east of the Rocky Mountains. In the *Divisions* case that immediately followed the order removing the territorial differences in class rates, the Commission ordered that, in line with the new uniform class rates, a uniform divisional scale be used by both Northern and Southern railroads in dividing revenues from North-South

---

2. Official territory lies generally east of the Mississippi River and north of the Ohio River and certain points in Virginia. Southern territory lies generally east of the Mississippi River and south of Official territory.

3. The Supreme Court sustained this action in New York v. United States, 331 U.S. 284 (1947). The uniform rates prescribed by the Commission became effective in 1952. *Class Rates Investigation, 1939,* 281 I.C.C. 213 (1951).

traffic. *Official-Southern Divisions,* 287 I.C.C. 497, 523, 546-47 (1953).[4]

In 1956, the Northern railroads, dissatisfied with this equal-factor basis of dividing joint rates, called upon the Commission's statutory authority to determine that the joint rate divisions "are or will be unjust, unreasonable, inequitable or unduly preferential" and to prescribe "just, reasonable and equitable divisions" in their place (49 U.S.C.A. 15(6)).

Upon completion of the hearings, issuance of an Examiners' Report, exceptions and replies thereto, and after hearing oral argument, the Commission issued its 1965 report and order finding that the existing divisions were in violation of Section 15(6). Considering each of the Section 15(6) criteria, the Commission found that both groups of carriers were being operated efficiently and that neither group should be considered as more or less efficient than the other (325 I.C.C. at 18), that there were no dif-

4. "Divisional scales," are the form in which the Commission has consistently prescribed divisions of North-South revenues. Divisional scales are simply tools for determining percentage divisions by a most elementary use of the common fraction. The use of the uniform divisional scale prescribed by the Commission in 1953 may be illustrated for a shipment moving 200 miles in the North and 400 miles in the South. The Northern factor on such shipment under the uniform scale is 101; the Southern factor is 149. Accordingly, the Northern division would be 40.4% (101 divided by 250, or 101 plus 149); the Southern division would be 59.6% (149 divided by 250). Where the 400-mile haul is in the North and the 200-mile haul is in the South, the Northern division is 59.6% and the Southern division is 40.4%. For shipments moving equal distances in the two territories, the equal-factor scale yields equal divisions, as can be shown by an example of a shipment moving 300 miles in the North and 300 miles in the South. The factor prescribed for a 300-mile haul is the same in each territory (125) (287 I.C.C. at 552, Col. 1). As a result, the percentage division for the North is 50% (125 divided by 250) and for the South is also 50%. Thus, under the uniform scale prescribed in 1953, Northern and Southern railroads each received the same compensation from joint revenues for performing the same amount of service in carrying North-South traffic in their respective territories.

ferences in importance to the public attributable to the two railroad groups (325 I.C.C. at 28), that neither group had greater revenue needs than the other (325 I.C.C. at 49), but that there is a decisive difference in the relative costs of rendering the service as between the groups of carriers (325 I.C.C. at 50).

Finding everything else to be substantially equal and that an adjustment in the existing divisions was required to compensate the respective carriers according to their expenditures in the joint effort of handling the traffic, the Commission concluded that the relative costs of the parties can properly serve as a guide for the determination of just, reasonable, and equitable divisions for the future (325 I.C.C. at 50).

The order prescribed a new divisional formula which gives the Northern railroads 45% more than the Southern railroads for each terminal service performed and 10% more than the Southern railroads for each mile of line-haul service performed. The Commission went on to construct new scales which reflected the principles affecting long versus short hauls and then prescribed a scale of divisional factors based on fully distributed costs which divide the revenue in proportion to those costs (325 I.C.C. at 50-51). The net effect of the Commission's action was to reduce the revenue of the Southern railroads by $8,838,000.[5]

The action in this Court was originally brought by forty-two (42) railroads which together made up virtually the entire rail system in the States of Alabama, Florida,

---

5. The Commission found that the net effect of the scales which it prescribed would be to reduce the revenues of the Southern railroads by $7,948,004 (325 I.C.C. at 50). The Commission's calculation was based upon "an overall estimate" and the Commission abandoned any defense of the accuracy of that calculation in its supplemental report, taking the position that it need not find the revenue effect of its action (325 I.C.C. at 453, 454).

Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee. The Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners filed an intervening complaint asking that the Commission's action be set aside in part. Forty-eight (48) railroads serving primarily Northern areas intervened in defense of the Commission's order.

It should be noted that plaintiffs do not seek to set aside the order in its entirety. Their argument is that the Commission determined two precise issues which are severable, namely: (1) whether the Northern lines were entitled to an increase in their divisions because of higher costs than the Southern lines, and (2) whether the old scale of divisional factors was invalid because of an excessive terminal element of 37 integers in the initial mileage block. The effect of the Commission's action on the two subjects (as petitioners put it) would be:

(1) The reconstruction of the divisional scale benefited the Southern railroads by $7,426,000 annually.

(2) The inflations accorded the Northern railroads reduced the Southern railroads by $16,264,000 annually.

(3) The net effect of these two computations was to reduce the revenue of the Southern railroads by $8,838,000.

Plaintiffs argue that we possess the power and should set aside as unlawful only that part of the order which prescribed increased divisions for the Northern lines. They further contend that such action would leave in force the old uniform scale, minus 37 integers which resulted from the Commission's alleged "separate action correcting the excessive terminal factors in the existing uniform divisional scale." This Court, it is true, by virtue of its authority under 28 U.S.C.A. 2321, has the power to "set aside in whole or in part" an order of the Commission, and there

are situations where provisions excised from administrative orders are separable or so minor as to make remand inappropriate. This is certainly not the case here. The Commission gave weight to the plaintiffs' initial mileage block argument only "in light of our subsequent conclusion to be guided by the relative costs in our general determination * * *." It cannot be known what the Commission would have done with respect to giving weight to that argument if it were viewed independent of the other facts which induced the Commission to prescribe the divisional bases which it did prescribe.

The Commission determined only one issue in two steps, (I.E.) it determined the unlawfulness of the old divisions and prescribed new divisions for the future. If the plaintiff succeeds here in permanently setting aside the Commission's order as it prescribes the new divisional scales, there would remain no severable part of the order. This is true because there is nothing whatever in the record to even suggest that the Commission found reasonable (provisionally, contingently, or otherwise) any basis of divisions other than that which plaintiffs seek to annul in this action. Accordingly, since the Commission's order is not severable and this Court lacks jurisdiction to prescribe divisions, the the function of this Court ends if it finds the Commission's order prescribing divisions is contrary to law or unsupported by adequate findings or substantial evidence. *F.P.C. v. Idaho Power Company*, 344 U.S. 17 (1952); *Saltzberg v. United States*, 176 F. Supp. 867 (S.D. N.Y. 1959).

We proceed to a review of the Commission's findings, conclusions and the evidence. The applicable standards of judicial review are limited in scope by settled principles of Administrative law, both general[6] and statutory.[7] These standards are to be vigorously enforced.

---

6. See Roadway Express, Inc. v. United States, 213 F. Supp. 868, 873 nn. 18 & 19 (D.C. Del. 1963), aff'd, 375 U.S. 12, 84 S. Ct. 53, 11 L. Ed. 2d 38 (1963).

7. 5 U.S.C.A. § 1009(e); 5 U.S.C.A. 1007(b).

In *Burlington Truck Lines v. United States*, 371 U.S. 156, 167-168 (1962), the Supreme Court stated:

> "Expert discretion is the life blood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' *New York v. United States*, 342 U.S. 882, 884 (dissenting opinion). 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' *Federal Communications Comm'n v. RCA Communications, Inc.*, 346 U.S. 86, 90. The Commission must exercise its discretion under § 207(a) within the bounds expressed by the standard of 'public convenience and necessity.' Compare *id.*, at 91. And for the courts to determine whether the agency *has* done so, it must 'disclose the basis of its order' and 'give clear indication that it has exercised the discretion with which Congress has empowered it.' *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177, 197. The agency must make findings that support its decision, and those findings must be supported by substantial evidence. *Interstate Commerce Comm'n v. J-T Transport Co.*, 368 U.S. 81, 93; *United States v. Carolina Carriers Corp.*, 315 U.S. 475, 488-489; *United States v. Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 511."

The statutory standards of judicial review are found in the administrative Procedure Act, which provides, to the extent here pertinent, that the reviewing court shall:

> "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; * * * (5) unsupported by substantial evidence in any case * * * reviewed on the record of an agency hearing provided by statute * * *. In making

the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error." (5 U.S.C.A. 1009(e)).

* * *

"Section 8(b)—

"Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof." (5 U.S.C.A. 1007(b)).

The statutory duty of the Commission is clear. Section 15(6) of the Interstate Commerce Act, 49 U.S.C.A. 15(6), directs it to set aside inequitable divisions of joint rates and then prescribe equitable ones. The ICC is explicitly directed to consider relative efficiency, public interest, terminal costs, revenue needs, and any facts which would, without regard to the mileage haul, entitle one carrier to a greater or lesser proportion of the joint rate. Among the "other facts" which the Commission may consider is the cost of service of the participating carriers, which issue may be entirely different from the issue of revenue needs. *Baltimore and Ohio RR v. United States,*

298 U.S. at p. 360. Here, the divisions were prescribed solely on the basis of the relative costs of handling the specific freight traffic at issue. The Commission said:

> "Everything else being substantially equal, the relative costs of the parties reflecting their respective operations as to this traffic can properly serve, as here, as a guide for the determination of just, reasonable, and equitable divisions." 325 I.C.C. at p. 50.

A fundamental rule of administrative law is that a reviewing court, in dealing with a determination of an administrative agency must judge the propriety of that action solely on the basis invoked by the agency. If this basis is inadequate, the court is powerless to affirm the administrative action. *S.E.C. v. Chenery Corp.*, 332 U.S. 194 (1947).

The *Chenery* rule was expressly applied in the review of an order of the Interstate Commerce Commission under the Administrative Procedure Act in *Burlington Truck Lines v. United States*, 371 U.S. 156, 168-169 (1962). The Supreme Court reaffirmed these rulings again in *N.L.R.B. v. Metropolitan Life Ins. Co.*, 380 U.S. 438, 443-444 (1965):

> "* * * the integrity of the administrative process requires that 'courts may not accept appellate counsel's post hoc rationalizations for agency action * * *,' Burlington Truck Lines v. United States, supra, 371 U.S. at 168; see Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 196. For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' Securities & Exchange Comm'n v. Chenery Corp., supra, 332 U.S. at 196."

This brings us to what petitioners refer to as the fundamental error, which affects virtually all of the Commissions's cost determinations. They put it this way: The higher costs claimed by the Northern railroads were found to have been incurred in handling this specific traffic in issue, but when it came to determining the relative costs which were to control this divisional formula, the Commission in at least seven instances relied, not upon the actual costs incurred by the two groups of railroads on the traffic in issue, but upon the unadjusted average costs incurred by the railroads on the average of all traffic handled in their respective territories. The Commission's rebuttal to this assertion appears on Page 6 of the Commission's original brief:

> "In a comprehensive analysis rejecting seven of Southern lines' adjustments as unsound in concept or based upon unsupported inapplicable facts or assumptions, the Commission accepted the Rail Form A costs, as restated by it, as reliably and accurately reflecting the costs attributable to the handling of North-South traffic. Whether these costs were adequate and whether they should have been more refined or supplemented as plaintiffs desired, are questions of fact within the exclusive competence of the Commission to determine, which were determined here and are based upon substantial evidence of record.

The Northern lines insisted throughout the hearing that unadjusted Rail Form A[8] costs reliably and accu-

8. Rail Form A is a formula for assigning the territorial or systemwide costs of operation including rents and taxes for any given year to the service units (ton-mile, car-miles, switching time, etc.) performed by the railroads during that year. This procedure assigns the costs as between those that are incurred in the origination and termination of a shipment, which are applicable to all shipments regardless of the distance of movement (terminal expenses), and those costs which are incurred in moving a shipment between the origin and destination points (line-haul expenses). It is adaptable for use in ascertaining the service unit costs of a single railroad or a group of railroads collectively. Territorial average costs here were based on the expenses and operations for 1956.

rately reflect the costs attributable to the handling of the traffic at issue. Only a relatively few elements of the Northern railroads' average costs are higher than the Southern railroads' costs. It is uncontroverted on this record that most elements of railroad costs (such as operating trains, maintaining roadways, etc.) are no higher in Northern railroads than for the Southern railroads. The inflation in the costs is attributable to a relatively few cost items. These include the cost of commuter operations, the cost of interchanging cars, the ratio of empty to loaded cars, the cost of railroad freight cars, and a few other items. As to each of these controverted items, the Commission relied exclusively on territorial average costs (Rail Form A). This was pegged on a finding that Rail Form A costs were reliable and reflected the costs attributable to the handling of the specific traffic. The theory is that in broadly based proceedings and interterritorial division cases, the territorial costs are entitled without more to full credence and weight as the initial indication of what would be fair and equitable. The Commission concluded in each of these instances that Rail Form A provided more reliable data for application to the Official-Southern traffic than did the adjustments prepared by the Southern lines. The Commission took no independent action to require the development of more refined cost data. Typical of this approach is the conclusion made by the Commission, in disposing of petitioners' request for an adjustment of switching costs:

> "For these reasons, we conclude that the contions of the northern lines are of merit and that Rail Form A territorial average switching costs more accurately measure the relative switching costs on each side of the border of the official-southern traffic than the switching costs computed by the southern lines." 325 I.C.C. at page 77.

Plaintiffs and intervening plaintiffs urge some 31 propositions as reflected in the Pre-Trial Order, but their

briefs resolve them into 17 separate questions of which the great majority relate to the Commission's treatment of relevant service costs. These are:

1. Section 7(c) of the Administrative Procedure Act provides that "The proponent of a rule or order shall have the burden of proof" (5 U.S.C. § 1006(c)); and this provision has been held to apply to proponents of changes in existing rate divisions. The Northern railroads here failed to satisfy their burden of proof, and the Commission failed to enforce that burden and thus violated Section 7(c) when it permitted the Northern railroads to rely entirely upon territorial average evidence, without showing that such averages were applicable to North-South freight traffic.

2. The Northern railroads had a duty to come forward with relevant evidence in their sole possession necessary to resolve the issues raised when the Southern railroads challenged the application of territorial average costs of all traffic to North-South traffic. The Commission erred in failing to enforce this duty and in holding instead that the absence of adequate and comparable evidence was a ground for resolving those issues against the Southern railroads.

3. The Commission has power to require the development of adequate and comparable cost data. Section 20(1) of the Act expressly grants the Commission the power "to require the carriers to provide full, true and correct answers to all questions upon which the Commission may deem information to be necessary" (49 U.S.C. § 20(1)). The Commission has a duty to use its powers to obtain cost evidence where such evidence is necessary to assure an adequate record. That duty was violated here as the Commission failed to take affirmative action to require the development of an adequate record as to the actual costs of handling the North-South traffic at issue.

4. Section 8(b) of the Administrative Procedure Act requires the Commission to "rule upon each * * * exception presented" (5 U.S. § 1007(b)). The Commission violated its statutory duty by failing to rule upon the Southern railroads' "Exception No. 1" dealing with the burden of proof, the duty of the party in possession of relevant evidence to come forward with it and the power and duty of the Commission to require a complete record.

5. The Commission stated as its standard the costs of handling North-South freight traffic, its reliance upon territorial average costs caused it to include in the Northern costs which it found, the Northern deficits from suburban commuter passenger service operations. This action constitutes a violation of both Sections 8(b) and 10(e) of the Administrative Procedure Act when judged against the standard stated by the Commission itself as governing in this case—that is, the relative costs of handling North-South freight traffic. The Commission made no reasoned findings and had before it no substantial evidence on which such a conclusion might be based. The lack of rational basis for the Commission's conclusion is highlighted by the Commission's own inconsistent finding that "many individual items of suburban service can be considered solely related * * * to suburban service" (325 I.C.C. at 78).

6. The Commission's prescription of divisions based on costs which include a separate allowance for "border interchange service" 58% higher for the North than for the South violates the requirement that the Commission's findings and conclusions be supported by substantial evidence within the meaning of Section 10(e) of the Administrative Procedure Act.

7. The Commission's action in using 32% higher car costs for the Northern railroads than for the Southern railroads violates Sections 8(b) and 10(e) of the Administrative Procedure Act since there were no reasoned findings

to support that action, nor was there substantial evidence in the record to support such a finding.

8. Section 15(6) of the Interstate Commerce Act provides that in a divisions case the Commission is to determine the costs incurred by the respective railroads which are "applicable to the transportation of passengers or property," a determination which has nothing whatever to do with the financial results of car rentals. Since the Commission's finding of 32% higher Northern car costs is in substantial part of the product of the greater amount of car rentals received by the Southern railroads (on traffic other than North-South traffic), the Commission's action also violates Section 15(6) because it fails to differentiate the railroads' separate function as car-owning or renting agencies as compared with their function as transportation agencies.

9. The Commission's use of territorial averages in computing the "switching costs" of the Northern and Southern railroads rather than the specific costs incurred by those railroads with respect to North-South traffic is not supported by reasoned findings and not based on substantial evidence in the record and thus violates Sections 8(b) and 10(e) of the Administrative Procedure Act. In addition, the Commission's rejection of the Southern railroads' special studies of switching costs on the traffic at issue because there were no comparable studies of Northern costs constitutes a violation of Section 7(c) of the Administrative Procedure Act in that it places the burden of proof on the Southern railroads rather than the proponents of the Northern inflation who had the evidence in their sole possession.

10. The Commission's use of territorial average "empty return ratios" rather than the actual empty return ratios for the North-South traffic in issue also violates Sections 8(b) and 10(e) of the Administrative Procedure Act

because it is unsupported by reasoned findings and not based on substantial evidence in the record. This also violates Section 7(c) of the Administrative Procedure Act which puts the burden of proof on the proponent of change, and the principle that those in possession of relevant data are obliged to come forward with it.

11. The Commission's inconsistent counting of cars interchanged and terminated and its rejection of the Southern railroads' attempts to correct that inconsistency violate the burden-of-proof provisions of Section 7(c) of the Administrative Procedure Act, the principle that those in possession of relevant evidence are obliged to come forward with it, and the obligation of the Commission to assure the making of an adequate record.

12. The Commission's use of territorial averages in dealing with the constant cost of transit commodities and its rejection of Southern adjustments designed to reflect the costs associated with North-South traffic also constitute violations of the burden-of-proof provisions of Section 7(c), the principle that those in possession of relevant evidence are obliged to come forward with it, and the obligation of the Commission to assure the making of an adequate record.

13. The "typical evidence rule" requires that there must be evidence typical in character and ample in quantity with respect to the divisions and services performed under the particular rate being divided. The Commission must consider evidence of actual services performed on particular traffic involved, and not rely wholly on averages which "are apt to be misleading." *United States v. Abilene & Southern R. Co.*, 265 U.S. 274 (1924), at p. 291; *Atchison, Topeka & Santa Fe R. Co. v. United States*, 225 F. Supp. 584, 592-600 (D. Colo. 1964).

14. The Commission's departure from uniform divisions related to uniform rate levels is not supported by the

reasoned explanation required by Section 8(b) of the Administrative Procedure Act.

Other alleged errors are:

15. The Commission's Supplemental Report invoked its quasi-judicial powers to decide this case as an aid to its executive function of defending its order before the Court. This resulted in an unconstitutional denial of notice and an opportunity to be heard. *Atchison, T. & S.F. Ry. Co. v. United States,* 231 F. Supp. 422, 428 (N.D. Ill. 1964).

16. Section 7(d) of the Administrative Procedure Act (5 U.S.C. § 1006(d)) requires that: "The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision * * *." The Due Process Clause of the Federal Constitution requires also that the Commission not go outside the record in reaching its decisions. The Commission violated both of these provisions when its use of its Cost Finding Section led it to rely on data not contained in the record in three separate instances.

17. The Commission's conclusion that the North suffers from inherent disadvantages in transportation conditions was supported by neither reasoned findings in the Commission's report as required by Section 8(b) of the Administrative Procedure Act, nor by substantial evidence, as contemplated by Section 10(e) of that Act.

Propositions 15 and 16 may be readily disposed of. The Commission's use of its Cost Section to give technical aid in analysis and evaluation of the cost evidence of record was an integral part of this administrative proceeding. This infringed the rights of no one.[9] The Commission's

9. The Commission's use of its staff assistants was specifically approved in T.S.C. Motor Freight Lines, Inc. v. United States, 186 F. Supp. 777 (S.D. Tex., 1960), aff'd sub nom. Herrin Transp. Co. v. United States, 366 U.S. 419 (1961).

issuance of its supplemental report was lawful and proper and constituted sound administrative practice.[10] Moreover, in issuing its supplemental report the Commission did not change its outstanding order in any respect, except as to divisions of the Norfolk Southern Railway, which is not here challenged.

Proposition 17 requires amplification. The failure to draw a clear line of demarcation between findings of fact, summaries, analyses and discussion had contributed heavily to the difficulty of reviewing this case. Intervening plaintiffs insisted before the Commission that for at least 30 years prior to this case, the Commission has consistently followed the view that primary responsibilty for meeting the costs and revenue needs of any territory lies with the people and industry of that territory, and that deviation from the equal division factor now in effect can be justified under 15(6) of the Act only if the higher costs found to exist are brought about by inherent territorial disadvantages. This is so, they say, because differences in cost which cannot be related to such inherent disadvantages might well be the product of nothing more than inefficiency or overcapacity on the part of one group of railroads. Plaintiffs insist that this was the express principle enunciated by the Supreme Court in *New York v. United States,* 331 U.S. 284. The Commission was cognizant of this contention, which was the main thesis of intervening plaintiffs before the Commission, and handled it as follows:

> "Relying on *New York v. United States,* 331 U.S. 284, 315 (1947), the interveners also take the position that natural disadvantages must be found in the North before we may increase the divisions of the northern railroads. In essence, however, other factors being equal, cost differences generally are the product of,

---

10. Alamo Express, Inc. v. United States, 239 F. Supp. 694, 697, 698 (W.D. Tex., 1965), aff'd 382 U.S. 19; Donaldson v. Read Magazine, 333 U.S. 178 (1948).

and reflect, the inherent advantages and disadvantages that go to make up the respective overall transportation conditions in the two territories." (Pgs. 27-28).

Plaintiffs read this language as an implicit holding by the Commission that the North suffers from inherent territorial disadvantages and a recognition of their judicial construction of Section 15(6), (i.e.) that only cost differences related to inherent disadvantages should be permitted to serve as a basis for an increase in interterritorial divisions. Defendants' answer to this is that the Commission made no finding on this question at all and "were simply commenting on Intervenors' contention." Surely, the Commission report should be so phrased that there be no room for such a dispute as this. We have read the language carefully and we have some hesitation in saying which interpretation is correct. The question of whether a showing of inherent disadvantages is prerequisite to an increase in territorial divisions is, at least in the first instance, a question for the Commission. If, as petitioners read the report, the Commission has held that such a showing is necessary, then this Court need only consider whether in view of such a test, the requirements of reasoned findings and substantial evidence of Sections 8(b) and 10(e) of the Administrative Procedure Act have been met. If, on the other hand, as defendants contend, the Commission has made no holding on the question of inherent disadvantages, the Court must consider whether the Commission's failure to resolve the material issue raised with respect to that question can be reconciled with the express requirement of Section 8(b). We are considering not a restriction upon the statutory powers of the Commission to make divisions, but whether the Commission followed requirements of the Administratve Procedure Act. The Administrative Procedure Act requires findings on material issues of law. N.L.R.B. v. Hearst Publications, 322 U.S. 111 (1944). If, as plaintiffs assert, the Commission has held that a showing

of inherent disadvantages is a pre-requisite to an increase in territorial divisions, then the Commission's conclusion (that higher Northern costs reflect inherent territorial disadvantages) is subject to attack because there are no findings as to what these inherent territorial disadvantages consisted of. Intervening plaintiffs have consistently and strenuously made the contention that as a matter of law the Northern railroads cannot have an increase in the absence of inherent territorial disadvantages. This case is to be remanded *for other reasons.* Upon remand, the Commission should decide and dispose of this contention in accordance with the Administrative Procedure Act.

The remaining exceptions to which we must address ourselves relate to cost evidence. Reduced to its simplest terms, the situation is this: All agree that the relevant costs are those of the North-South freight traffic to which the divisions apply. However, when it came to determining the relative costs which were to control this divisional formula, the Commission relied upon the actual costs incurred on the average of all traffic handled in the respective territories.[11] The Commission, as to each of seven specific items of unit cost (which account for the entire inflation) decided that the Northern lines established a prima facie case that Rail Form A costs properly measure the cost of the specific traffic.[12] In each instance the Southern lines introduced evidence and sought adjustments to reflect what they contended to be the actual cost of the specific traffic. In each instance the Commission rejected these adjustments, and employed Rail Form A territorial unit costs as accurately representing the cost of service. The Commis-

11. The North-South traffic in issue constitutes on 6.0% of the total freight revenue of the Northern railroads and constitutes 21.4% of the total freight revenue of the Southern railroads (V.S. 36, Ex. 5).

12. The Northern lines presented a train utilization study, which revealed that of the total of 13,647 loaded trains shown for five study lines for a selected week in May of 1959, 6,099 trains representing 44.7% were found to be transporting at least one loaded car moving from or destined to Southern territory.

sion did not assume any responsibility for the development of a more adequate record, and in several instances held that the absence of comparable evidence in the record itself prevented adjustments in territorial averages.[13]

Typical of the overall approach of the Commission was its inclusion of suburban passenger deficits as a part of the cost of handling North-South traffic. Through the use of average costs, deficits attributable to both inter-city passenger service and suburban commuter service were included in cost computations. It is generally agreed that the intercity passenger deficits should be considered as a part of the cost of providing freight service, because such deficits are usually the product of costs allocated to passenger operations from common facilities which must be maintained in order to provide freight service.[14] Suburban (commuter) deficits are in a different category. The railroads, which on today's market carry large numbers of people from their homes in the suburbs to their place of work in the cities, often, if not preponderantly, use separately constructed and maintained lines. These suburban commuter operations require equipment and facilities that in many instances have no other use whatsoever. The reason stated by the Commission for the inclusion of commuter deficits is that "the suburban service deficit includes common costs" which must be incurred to provide freight service (325 I.C.C. at p. 78). But the Commission also found as a fact that "many individual items of suburban

13. For instances in which evidence of the Southern railroads was rejected for lack of "comparable" data for the North, see 325 I.C.C. at 69 (refrigerator car empty return ratios); 325 I.C.C. at 76; 325 I.C.C. at 60. The same result was reached due to an absence of "adequate" data at 325 I.C.C. at 66 (box car empty return ratios).

14. The necessity for maintaining common facilities for freight service was explained by the Supreme Court in King v. United States, 344 U.S. 254, 265 (1952):

> "In Florida, moreover, the discontinuance of railroad passenger service would not permit the discontinuance of high-speed tracks and equipment because of the need for fast freight schedules to transport perishable fruits and vegetables from Florida."

service can be considered solely related * * * to suburban service." (325 I.C.C. at p. 78). This latter finding seems to be a concession that many commuter facilities are solely related to that service and have nothing whatsoever to do with the cost of handling North-South traffic or any other freight traffic. The critical issue on this cost item was to determine how much of the railroad's cost of commuter service was in fact common with the cost of freight service and how much was solely related to commuter service. But, in accordance with its general approach to these issues, the Commission, by adopting Rail Form A, inflated the Northern railroads' freight cost by the entire commuter deficit of those railroads, without regard to the plain conflict between this action and its own finding that "many individual items of suburban service can be considered solely related * * * to suburban service." Counsel for defendants, during argument, repeatedly suggested that the commuter deficits are properly chargeable to the traffic at issue as an "overhead." They argued:

> "* * * there has been a definite theory upon which the Commission has allocated these costs as a matter of policy, and that is that there is a need for that revenue to continue operations."

The complete answer to this contention is that the Commission did no such thing. The revenue need issue was hotly contested before the Commission, each group contending that its needs were greater—the Northern railroads, on the basis of lower rates of return; the Southern railroads, on the basis of their growing service responsibilities to an expanding economy. The Commission rejected both contentions, and categorically stated:

> "We find that no affirmative reasons appear in this record which would warrant any adjustment of the divisions in question over and above the relative cost of service, either on the grounds of greater revenue needs or otherwise."

There is no finding rationalizing the conclusion that suburban passenger deficits reflecting costs not common to freight service, but "solely related" to suburban passenger service, can or should be treated as cost of North-South freight traffic.

The Supreme Court, on May 29, 1967, in the cases of *C. and N.W. Ry. Co. v. A.T. and S.F.R. Co.*, and *U.S. v. A.T. and S.F.R. Co.* (Nos. 8 and 23, October Term, 1966) commented on a possible divisions case, where, as here, it is argued that carriers in one part of the country are being required to subsidize passenger operations elsewhere. There, it was said:

> "And while the Commission has sometimes acted to offset passenger deficits in freight rate cases, the issues are quite different when, in a divisions case, it is argued that carriers in one part of the country should subsidize the passenger operations of carriers elsewhere.
>
> "If the Commission were to give controlling weight to passenger deficits in a divisions case, it might be appropriate to take more evidence on the issue and discuss it in greater depth than the Commission did here. But in light of the fact that, in this case, passenger deficits were of negligible relevance to the Commission's decision to increase the Midwestern divisions, we find no errors in the Commission's findings and procedure on this point that would justify setting aside its order."

Another example of the Commission's approach is characterized by its use of a territorial average box car empty return ratios. The nature of this problem is summarized in the dissenting opinion of Commissioner Murphy (325 I.C.C. 54, 55):

> "The higher than average empty return ratios used for cars moving over the official lines is another instance where true costs have not been used. The

official lines handle approximately 800,000 carloads of automobile parts annually which originate in the Detroit, Mich., area and are destined to assembly plants in various parts of the country, including New Jersey, California and Georgia. Many of these cars are fitted with special devices to protect the automobile parts in transit. Because these cars carrying parts contain special devices and are assigned to particular plants manufacturing such parts in official territory, they normally experience an empty return movement which is, for all practical purposes, 100 percent. No adjustment is made in the cost data to cover the higher empty return costs of this type of equipment. Territorial average box car empty return ratios, as used in the report, overstate the costs of the official railroads when applied to Official-Southern traffic."

Another example of the general approach of the Commission is illustrated in its treatment of the issue of "Switching costs" (325 I.C.C. 71-78). The specific cost factor was the amount of the switching service actually performed in originating and terminating the traffic at issue. The Northern railroads placed their entire reliance upon the territorial average switching service for the average car in each territory.[15] The Southern railroads sought to develop the costs associated with the specific traffic in issue. In the face of these special studies, the Northern railroads continued to rely upon Rail Form A switching costs, which were substantially higher in the North. In its cost findings on this point, we repeat the Commission's finding at 325 I.C.C. 77:

"* * * the contentions of the Northern lines are of merit and that Rail Form A territorial average switching costs more accurately measure the relative switch-

15. The North-South traffic constitutes only 4.07% of the total cars originated and terminated in the North and 8.93% of the total cars originated and terminated in the South.

ing costs on each side of the border of the Official-Southern traffic than the switching costs computed by the Southern lines."

Although important as separate issues, the three items heretofore detailed are of greater significance as illustrations of the more pervasive error of the Commission in prescribing divisions on the basis of the average cost of all traffic for this series of important elements of cost which are higher in the North for reasons that have not been shown to have any relation to the North-South freight traffic here at issue. We are not suggesting that one might not dig out of the record argumentative support for the Commission's view, but it is not conducive to a fair administration of the Commerce Act, nor is it a proper discharge of this Court's duty, to require us to dig out indications of evidence from this massive record.

Defendants argue that the question of whether or not Rail Form A was representative, and whether it should have been supplemented are questions of fact, the determination of which is within the competence of the Commission. We start, of course, from the premise that on the subject of transport economics, the Commission's judgment is entitled to great weight. The appraisal of cost figures is itself a task for experts and, unlike a problem in mathematics, it cannot be precisely right or wrong. We know, too, that the Rail Form A cost formula was devised for the express purpose of measuring territorial average costs and has been widely used as an acceptable means of comparing relative transportation costs. It represents a comprehensive study entitled to full weight when the issue is one that it was designed to cover. However, this formula was designed to measure the cost of handling all the traffic in two or more territories, and cannot appropriately be accepted without further evidence for mechanical application to particular segments of traffic in a divisions case. The "many minute calculations" contained in

Rail Form A were used to measure the overall average costs and certainly produce a misleading appearance of exactitude when applied mechanically to measure a specific cost of a specific body of traffic such as that involved here. Evidence of overall territorial averages surely can and should be considered, but as to specific important cost items the Commission should not wholly and exclusively rely on such averages. *United States v. Abilene and Southern R.R. Co.*, 265 U.S. 274; *Atchison, Topeka and Santa Fe Ry. Co. v. United States*, 225 F. Supp. 584. The Commission stated its exclusive standard to be the relevant cost of handling the specific freight traffic to which the divisions apply. We are persuaded that the order is not based on substantial evidence nor supported by reasoned findings within the meaning of Sections 8(b) and 10(e) of the Administrative Procedure Act because the use of territorial averages accounting for the Northern inflation has not been supported with findings of evidence relating any such inflation to the North-South freight traffic.

What is appropriate in one case may be inappropriate in another. We do not hold that the Commission was required to start from scratch and construct a new divisional scale directly from cost data. We do find that, having stated its exclusive standard to be the relevant cost of handling the freight traffic to which the divisions apply, the Commission's order is not based on substantial evidence within the meaning of the Administrative Procedure Act. We note that in the Chicago and N.W. R. Co. case (supra, Supreme Court of the United States, May 29, 1967), disputes over the applicability of Rail Form A occupied a large part of the administrative proceedings. There, the Commission based its cost findings on a special cost study and analysis prepared by the Mountain-Pacific carriers, and made certain adjustments which it considered more accurately reflected the true costs of the traffic involved. These adjustments (3) were derived from Rail

Form A. The Supreme Court held that the attack on the legal validity of these adjustments to costs were unsubstantial. Here, of course, the entire inflation is pegged on relative costs derived from Rail Form A.

With the Commission's expertise in mind, it is our duty to review the record and the conclusions reached, as required by the provisions of the Administrative Procedure Act. As to the sufficiency of the evidence to support the order, it is not the proper function of this Court to substitute its judgment or to weigh evidence.[16] On the other hand, it is our duty to ascertain whether or not the findings and conclusions are supported by substantial evidence. We have endeavored to review the record without a rubber stamp approach. We repeat and reiterate that in making our decision we are not unmindful of the function that the Interstate Commerce Commission is to perform and the discretion that it has. The Commission has had a hard and difficult task here. The record reveals that this facet of this case began in 1956 and that the report and order of the Commission was not issued until February 3, 1965. This in itself certainly suggests the magnitude of the problem which faced the Commission.

"Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' "[17] In 1953, in recognition of its previous action in prescribing

16. Illinois Commerce Comm. v. United States, 292 U.S. 474, 484, 54 S. Ct. 783, 78 L. Ed. 1371 (1933); Boston and Maine R.R. v. United States, 153 F. Supp. 952 (D. C. Mass., 1957); see Nashua Motor Exp., Inc. v. United States, 230 F. Supp. 646 (D.C. N.H. 1964); J. B. Acton, Inc. v. United States, 221 F. Supp. 174 (W.D. Mo. 1963), aff'd, 376 U. S. 779, 84 S. Ct. 1133, 12 L. Ed. 2d 83 (1963).

17. Burlington Truck Lines v. United States, 371 U.S. 156, 167, 83 S. Ct. 239, 245, 9 L. Ed. 2d 207 (1962).

a uniform rate level, the Commission prescribed divisions on a uniform basis with no inflation for either Northern or Southern railroads and concluded that (287 I.C.C. at 526):

> "* * * We consider it to be the safest assumption for the future upon the facts before us that neither contesting group will have an appreciably lower basis of operating costs than the other, and that there are no other relevant circumstances which are of sufficient importance to justify higher divisional factors for one group than the other."

Furthermore, for many years prior to this case the Commission has consistently followed the view that the primary responsibility for meeting the cost and revenue needs of the railroads of any territory lies with the people and the industry of that territory. *New England Divisions,* 126 I.C.C. 579, 599 (1927); *Divisions of Rates, Official and Southern Territories,* 234 I.C.C. 175, 190 (1939); *Official-Southern Divisions,* 287 I.C.C. 497, 523 (1953); *Akron, Canton & Youngstown R. Co. v. Atchison, T. & S.F. Ry. Co.,* 321 I.C.C. 17, 51 (1963). In this very case, prior to re-opening, the Commission held that the primary division of revenues accruing from this traffic were to be made on an equal-factor scale. We recognize that the Commission is not perpetually bound by their 1953 holding, but we do believe that the Commission has special responsibilities in a case of this magnitude when it departs from its prior finding (*Sec'y of Agriculture v. United States,* 347 U.S. 645). The Commission's duty to use its powers to obtain cost evidence where such evidence is necessary to assure an adequate record was stressed in *Pacific Inland Tariff Bureau v. United States,* 129 F. Supp. 472, 486 (D.C. Ore., 1955):

> "The Commission is not a passive arbitrator of disputes between carriers. It is the instrument chosen

by Congress to regulate interstate commerce in the public interest. When carriers fail to produce satisfactory evidence, the Commission may require them to produce additional and more satisfactory evidence. It may make its own investigation. It may consult with 'other interested and presumably better informed agencies of the Government as to particular question.' *Cantlay and Tanzola, Inc. v. United States,* 115 F. Supp. 81. However, the record does not disclose that any of those courses was followed in this case. *The fate of our national transportation system should not depend upon evidence either offered or withheld by competing carriers.*" (Emphasis added.)

The same principle was reiterated recently by the Second Circuit in *Scenic Hudson Preservation Conference v. Federal Power Commission,* 354 F. 2d 608 (2nd Cir. 1965). There, the Court set aside an order of the Federal Power Commission, saying (354 F. 2d at 620):

"In this case, as in many others, the Commission has claimed to be the representative of the public interest. This role does not permit it to act as an umpire blandly calling balls and strikes for adversaries appearing before it; the right of the public must receive active and affirmative protection at the hands of the Commission.

"This court cannot and should not attempt to substitute its judgment for that of the Commission. But we must decide whether the Commission has correctly discharged its duties, including the proper fulfillment of its planning function in deciding that the 'licensing of the project would be in the overall public interest.' The Commission must see to it that the record is complete. The Commission has an affirmative duty to inquire into and consider all relevant facts. See *Michigan Consolidated Gas Co. v. Federal Power Comm'n* 283 F. 2d 204, 224, 226 (D. C. Cir.), cert.

denied, 364 U.S. 913 (1960); *Isbrandtsen Co. v. United States*, 96 F. Supp. 883, 892 (S.D. N.Y. 1951), aff'd by an equally divided court, 342 U.S. 950 (1952); Friendly, *The Federal Administrative Agencies*, 144 (1962); Landis, *The Administrative Process*, 36-46 (1938); cf. *City of Pittsburgh v. Federal Power Comm'n*, 237 F.2d 741 (D.C. Cir., 1956)."

There is no doubt as to the Commission's statutory powers to require the development of adequate and comparable cost data. Section 12(1) of the Interstate Commerce Act authorizes the Commission to "obtain from such carriers and persons such information as the Commission deems necessary to carry out the provisions of [the Act]" (49 U.S.C. § 12(1)). Section 20(1) of the Act expressly grants the Commission the power "to require * * * special reports from carriers" and to require the carriers to provide "full, true and correct answers to all questions upon which the Commission may deem information to be necessary" (49 U.S.C. § 20(1)). This power was sustained in *Baltimore & O.R. Co. v. ICC*, 221 U.S. 612, 621 (1911).

The Commission in this case never mentioned or, for all that appears, even considered the possibility of developing a record on the specific cost at issue, but merely relied upon unadjusted territorial average costs to reflect the average cost of the traffic at issue. The Commission is not expected to merely call balls and strikes. The ICC is not the prisoner of the parties' submissions. It is empowered to investigate and gather evidence beyond that presented where exercise of that power is necessary to supplement the record and is in the public interest. The record here does not show, except in nebulous fashion, that the cost figures represent anything but the overall average territorial costs and they certainly are not computations of cost figures of the particular movements here involved. The ICC has tools to assemble complete factual records, it employed virtually none of them in this extremely important pro-

ceeding. (See Justice Brennan's concurring opinion in the Railroad merger cases, 386 U.S. 372, decided March 27, 1967).

This opinion has been rather lengthy and includes findings and conclusions. By way of repetition and emphasis we add the following specific conclusions:

Conclusions of Law

1. This Court has jurisdiction, under 5 U.S.C. § 1009 and 28 U.S.C. §§ 1336, 2284, 2321-2325, to suspend, enjoin, annul and set aside the enforcement, operation and execution of orders of the Interstate Commerce Commission.

2. The venue of this action is properly laid in the Eastern District of Louisiana under 28 U.S.C. § 1398.

3. The Commission has power to require the development of adequate and comparable cost data. Section 20(1) of the Act expressly grants the Commission the power "to require the carriers to provide full, true and correct answers to all questions upon which the Commission may deem information to be necessary" (49 U.S.C. § 20(1)). The Commission has a duty to use its powers to obtain cost evidence where such evidence is necessary to assure an adequate record. That duty was violated here as the Commission failed to take affirmative action to require the development of an adequate record as to the actual costs of handling the specific traffic at issue.

4. The Commission stated as its standard the costs of handling North-South freight traffic, but reliance upon territorial average costs caused it to include in the Northern costs deficits from suburban commuter passenger service operations. This action constitutes a violation of both Sections 8(b) and 10(e) of the Administrative Procedure Act when judged against the standard stated by the Commission itself as governing in this case—that is, the relative costs of handling North-South freight traffic. The Commission had before it no substantial evidence on which

such a conclusion might be based. The lack of rational basis for the Commission's conclusion is highlighted by the Commission's own inconsistent finding that "many individual items of suburban service can be considered solely related * * * to suburban service" (325 I.C.C. at 78).

5. The Commission's use of territorial averages in computing the "switching costs" of the Northern and Southern railroads rather than the specific costs incurred by those railroads with respect to North-South traffic is not supported by reasoned findings and not based on substantial evidence in the record and thus violates Sections 8(b) and 10(e) of the Administrative Procedure Act.

6. The Commission's use of territorial average "empty return ratios" rather than the actual empty return ratios for the North-South traffic in issue also violates Section 8(b) and 10(e) of the Administrative Procedure Act because it is unsupported by reasoned findings and not based on substantial evidence in the record.

7. The "typical evidence rule" requires that there must be evidence typical in character and ample in quantity with respect to the divisions and services performed under the particular rate being divided. The Commission must consider evidence of actual services performed on particular traffic involved, and not rely wholly on averages which "are apt to be misleading." Here, the Commission relied on "unsifted averages." *United States v. Abilene & Southern Railroad Co.*, 265 U.S. 274 (1924), at p. 291; *Atchison, Topeka & Santa Fe R. Co. v. United States*, 225 F. Supp. 584, 592-600 (D. Colo. 1964).

Conclusion

We are not unmindful of the complicated nature of this problem. However, when the outcome of factual issues is bound to cut deeply into economic relations on such a scale and when the result involves a departure from an equal division formula previously adopted, it is appropriate to

remand the case to the ICC for further study, followed by an explicit development of a record to assure adequate and comparable evidence with respect to the cost of the specific traffic at issue.

With the passage of each year, the 1959 test year adopted here becomes more and more vulnerable to the charge of staleness. It therefore has less and less to recommend it as a reliable basis upon which to predicate a division order. We make this observation not to indicate that it would necessarily be an abuse of discretion for the Commission not to re-open the investigation to receive later operating figures, but as a suggestion that such a re-opening well might be warranted.

The Commission Order, in its entirety, should be set aside and the cause remanded to the Commission for further proceedings consistent with the views expressed herein.

Counsel for plaintiffs will prepare and submit an appropriate decree in conformity with this opinion.

APPENDIX B

Final Decree and Stay Order of the District Court

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION
No. 15454
DIVISION "C"

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., Plaintiffs,

VS.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

Final Decree

This action came on for trial before the Court, Honorable John Minor Wisdom, United States Circuit Judge,

Honorable Edwin F. Hunter, Jr., United States District Judge, Honorable E. Gordon West, United States District Judge, and the issues having been duly tried, heard and determined, an Opinion with the findings of fact and conclusions of law having been duly filed, Now, Therefore, in accordance with said Opinion and its findings of fact and conclusions of law,

IT IS ORDERED AND ADJUDGED that the order of the Interstate Commerce Commission dated February 3, 1965, as supplemented by the third ordering paragraph of the order of that Commission dated May 18, 1965 (each as entered by the Commission in the cause under its Docket No. 29799, *Akron Canton & Youngstown R. Co., et al. v. Aberdeen & Rockfish R. Co., et al.*, and Docket No. 29885 *Official Southern Divisions*), and each of said orders, be and the same are hereby set aside and that said cause be and the same is hereby remanded to the Commission for further proceedings consistent with the Opinion, findings of fact and conclusions of law of this Court.

JOHN MINOR WISDOM
United States Circuit Judge

EDWIN F. HUNTER
United States District Judge

E. GORDON WEST
United States District Judge

Dated: August 8, 1967.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

CIVIL ACTION
No. 15454

ABERDEEN AND ROCKFISH RAILROAD COMPANY, ET AL., Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, Defendants,

Order Staying Decree

IT IS HEREBY ORDERED AND ADJUDGED (1) that the effectiveness of the Decree signed, dated, and entered concurrently herein on this date is hereby stayed for the period of sixty (60) days from said date, and if a notice or notices of appeal to the Supreme Court are filed within such period, then this stay shall continue until final disposition or termination of such appeal or appeals; and (2) that during the aforesaid period or periods the protective provisions contained in Paragraph 3 of the Order of this Court of June 3, 1965, denying Application of Plaintiffs and Intervening Plaintiffs for an Interlocutory In-

junction and Dissolving the Temporary Restraining Order, shall continue in full force and effect.

Dated: August 8, 1967.

JOHN MINOR WISDOM
John Minor Wisdom
United States Circuit Judge

EDWIN F. HUNTER
Edwin F. Hunter
United States District Judge

E. GORDON WEST
E. Gordon West
United States District Judge

APPENDIX C

Reports and Orders of the Commission.

1

No. 29885 [1]

OFFICIAL-SOUTHERN DIVISIONS

IN THE MATTER OF DIVISIONS OF JOINT RATES BETWEEN OFFICIAL AND SOUTHERN TERRITORIES

Decided February 3, 1965

Upon further hearing, present divisions of joint interterritorial rates between official and southern territories found unjust, unreasonable, and inequitable. Just, reasonable, and equitable divisions prescribed. Prior reports, 287 I.C.C. 497, 289 I.C.C. 4, 291 I.C.C. 90, 294 I.C.C. 739, and 298 I.C.C. 83.

REPORT OF THE COMMISSION ON FURTHER HEARING

2

FREAS, *Commissioner:*

By complaint in No. 29799, filed July 24, 1947, the northern lines assailed as unlawful the divisions of joint rates on citrus fruit from points in Florida to destinations

1. This report also embraces No. 29799, Akron, Canton & Youngstown Railroad Company et al. v. Aberdeen & Rockfish Railroad Company et al.

in official territory. Thereafter, on December 4, 1947, we instituted, on our own motion, the investigation in the title case for the purpose of determining whether the then existing divisions of joint class and commodity rates between points in official territory and points in southern territory (as both territories are defined in *Class Rate Investigation, 1939,* 262 I.C.C. 447, 457) were unjust, unreasonable, or otherwise unlawful. All railroad carriers in the two territories were named as respondents.[2] Thus, as originally instituted, the two proceedings brought in issue the divisions of all joint interterritorial rates between the North and the South, except those on coal and coke made from coal which were excluded by mutual consent of the parties.

The original principal decision dated January 12, 1953, 287 I.C.C. 497, called the first 1953 report, embraced all involved traffic. By it, we prescribed primary divisions based upon equal mileage factors for the northern and southern lines, except that as to joint proportional rates on grain and grain products from East St. Louis, Mo., Louisville, Ky., and Cincinnati, Ohio, to points in southern territory, the northern factors prescribed were 75 percent of the northern general factors. That report also provided that arbitraries which were included in the joint rates should be deducted before prorating and that in lieu of specific apportionment of the arbitrary in respect of the rates on citrus fruit from Florida to official territory one percentage point should be deducted from the northern division and added to the southern division.[3] Also in that report the dividing points for such primary divisions were

2. Individual carriers will sometimes be referred to by their initials or other short titles.

3. Southern lines now ask that these findings relating to arbitraries be affirmed. Northern lines voiced no objection thereto, although they include as an arbitrary to be deducted before prorating an excess of $57 per car in the rates on vegetables to New York over the rates to New Jersey. This latter matter is discussed separately hereinafter and is denied. Under the circumstances, the prior findings as to arbitraries will be adopted herein.

fixed at the points of actual interchange rather than at the territorial boundaries.

In a report on reargument, 289 I.C.C. 4, decided May 26, 1953, called the second 1953 report, the prior report was modified so as to make the prescribed divisions applicable only to and from the existing primary dividing points. This report also postponed the effectiveness of the prescribed divisions to and from points on the Norfolk Southern
3 Railway Company, the Atlantic and East Carolina Railway Company, and the Beaufort & Morehead railroad Company (A. T. Leary, lessee) pending further hearing. The prescribed divisions became effective on July 15, 1953.

Upon petitions of various parties the findings in the two prior reports were interpreted and certain conclusions were revised in three supplemental reports. In 291 I.C.C. 90, of November 2, 1953, the definition of northern lines was broadened to include the Toledo, Peoria & Western Railroad Company, and the proceeding was reopened for further hearing with respect to divisions of rates between points on certain western trunklines and points in southern territory where no northern (official territory) carrier was a party to such rates, and with respect to divisions of joint interterritorial rates between points on the line of the Atlantic and Danville Railway Company west of Suffolk, Va., and points in official territory. The third and fourth supplemental reports, 294 I.C.C. 739 and 298 I.C.C. 83, made certain interpretations of previous findings.

On November 2, 1956, the northern lines petitioned for general reopening of these proceedings for further hearing and for modification of the order of January 12, 1953, as modified by the order of May 26, 1953. The petition was held in abeyance at the request of the interested parties until April 1, 1959, when the northern lines asked that the petition be processed. After replies had been duly filed, we reopened the proceeding for further hearing by order

dated July 20, 1959. The scope of the divisions now at issue is in some respects more limited than that covered in the 1953 reports. The joint interterritorial rates now excluded and the reasons therefor are listed in appendix A hereto.

The instant proceedings have been the subject of lengthy hearings during which considerable evidence was adduced by all parties in light of the criteria of section 15(6) of the Interstate Commerce Act. The hearing examiners found the present divisions unjust, unreasonable, and inequitable, and prescribed new divisions. Exceptions to the recommended report and order were filed by the official territory respondents, the southern territory respondents, and jointly by the Southern Governors' Conference and the Southeastern Association of Railroad and Utilities Commissioners. These parties also filed replies. Exceptions were also filed by the Norfolk Southern Railway Company and the North Carolina Utilities Commission. We have heard the parties in oral argument. Our conclusions differ in part from those recommended.

4 We consider the examiners' statement of facts to be substantially correct, as material, and in this report adopt it as our own. We have used here verbatim certain portions of that statement where necessary for clarity of discussion.

Prior to our consideration of the evidence, however, certain preliminary matters must be resolved. Initially, the southern lines contend on exceptions that our Section of Cost Fnding has consulted with and furnished advice to the examiners upon the issues, and although the southern lines specifically requested that they be given notice of and an opportunity to participate in any such consultations they were denied this right. Such action is said to deny the full and fair hearing guaranteed by section 15(6) of the Interstate Commerce Act, sections 5, 7, and 8 of the Ad-

ministrative Procedure Act, and the fifth amendment to the Constitution.

In our opinion, hearing examiners and the Commission itself may properly consult with staff members of the cost section or receive from them analyses of the cost evidence in the record, and such advice or analyses need not be furnished to the parties when given or prepared by cost section employees who have neither testified nor prepared exhibits in the case. See *United States v. Morgan*, 313 U.S. 409 (1941); *T.S.C. Motor Freight Lines, Inc., v. United States*, 186 F. Supp. 777 (S.D. Tex. 1960), affirmed *sub nom. Herrin Transportation Co. v. United States*, 366 U.S. 419 (1961). Any such cost section assistance is a part of, and solely in aid of, the internal process of decision. There was no error prejudicial to the southern lines. The southern lines also contend that the examiners erred in refusing to receive or mark certain exhibits dealing with switching minutes and empty-return ratios. However, the examiners' ruling related to exhibits offered after the southern lines had rested their case and after the date fixed for the submission of their evidence. Such action was in accord with the procedural order adopted in this proceeding. It did not constitute an abuse of discretion nor deny the southern lines a fair hearing. The ruling is affirmed.

The northern lines contend that the examiners erred in rejecting certain portions of their rebuttal cost exhibit. The involved rejected data was found by the examiners to be new and additional material beyond the scope of rebuttal. Since the northern lines refused to incorporate the material as part of their case in chief and to accord the southern lines the right of rebuttal, the examiners were correct in their ruling that the matter constituted improper rebuttal and in excluding it.

5 Finally, at oral argument, counsel for the southern lines in response to a question by counsel for the northern lines indicated an intent to rely on the holding as

to the typical evidence rule set forth in *Atchinson, T. & S. F. Ry. Co. v. United States,* 225 F. Supp. 584 (D. Colo. 1964), hereinafter called the *Western Trunklines* case. There, the court in reviewing the *Orient* case (*United States v. Abilene & S. Ry. Co.,* 265 U.S. 274 (1924)) and other decisions, held that in finding an existing scale of divisions unlawful the Commission cannot rely exclusively on aggregate or average data in making this initial determination but must have representative evidence which it considers typical in character and ample in quantity to permit a determination with respect to each division of each rate of every carrier. As we understand the position of the southern lines at oral argument, they contend that no such evidence is of record and that only "conglomerate averages" are shown.

The court in the *Western Trunklines* case stated, at page 595:

> Far from precluding Commission consideration and use of average data, the opinion in the *Orient* case states that "aggregate results should properly be taken into consideration by the Commission." The point of the *Orient* case is that the Commission may not rely wholly and exclusively on average or aggregate data. Before it relies on average or aggregate data, the Commission must make sure that the divisions formula under consideration (although seemingly just and equitable when viewed in terms of its impact on a group of railroads as a group), has not been construed in such a way that its impact on any particular division of any particular rate as applied to any particular carrier is unjust. This the Commission must do by considering evidence fairly representative of each division of each rate of every carrier in order that some inequity which might remain undisclosed by average or aggregate data is not permitted to slip in unnoticed.

It also indicated at page 592:

> The "typical evidence" rule in divisions cases, however, does not have to do with individual shipments made by particular carriers, as plaintiff's contend; rather, it has to do with particular divisions of particular rates among particular carriers. Evidence showing the volume and type of traffic moving subject to the representative rates, although highly probative, and probably otherwise essential to a just and equitable decision, is not absolutely required by the "typical evidence" rule.

Counsel for the northern railroads then indicated at the conclusion of oral argument that, if the Commission chooses to rely on the *Western Trunklines* case, it should require both sides to submit the abstracts of settlement statements among the various carriers which would reflect the specific data mentioned in the court's holding. It was urged,
6 however that the holding in the *Western Trunklines* case was erroneous, and that, in any event, no lack of evidence had been advanced of record by the southern lines, except perhaps as to grain and grain products, during the lengthy hearings herein. Both sides had freely exchanged such settlement sheets during the hearing, but they were not made part of the record. If submission of such data were required, the northern railroads indicated that they would waive cross-examination.

Except as hereinafter indicated, necessary typical evidence is of record, and we have properly considered and evaluated it. At this point, we note that the southern lines on brief have characterized their traffic study as providing—

> The most current data available with respect to the normal annual movement of Official-Southern traffic ever presented to the Commission. This information shows the services performed and revenue received by each carrier participating in the movement of the precise traffic at issue. It measures the participation of

Class I and Class II railroads, individually and as groups, in each territory, and shows the relative importance of Official-Southern revenues and ton-miles to the railroad groups and individual carriers.

Moreover, both the northern and southern lines' traffic studies are based on samples of the interline abstracts, the regularly maintained basic records, freely exchanged at the hearing, on which interline revenues from particular rates are divided among each participating carrier. Under the circumstances, as will be further shown and except as hereinafter indicated, we find the typical evidence contention of the southern lines to be without merit. To the extent that the *Western Trunklines* case also requires due consideration of all of the criteria of section 15(6), we have done so.

Traffic Studies

Introduction.—Both the northern and the southern lines made traffic studies for use in this proceeding. The northern lines introduced two studies developed from sampling, embracing carload shipments (except coal and coke made from coal) moving on joint rates (including aggregate-of-intermediate rates which automatically displace single-factor joint rates) between points in southern territory and points in official territory. The southern lines' study, also developed in accordance with a sampling procedure, was broader in scope and coverage than that of the northern lines. The studies of both groups do not
7 cover less-than-carload traffic.

The southern lines' tabulations show many of the characteristics of the traffic in the same form as that produced in the northern lines' study. The southern lines' study, unlike that of the northern lines, does not make separate showings as to citrus fruit and vegetables, such traffic having been included in the overall general study. However, the southern study shows separately the traffic units and revenue, and permits an application and comparison of costs thereto. Coal and coke made from coal

are not included in the southerns' final tabulations. Certain classes of traffic are not embraced in the study since, for reasons shown, the southern lines deem the divisions of rates thereon not here in issue. These segments are: (1) traffic to and from western carriers' stations in official territory, (2) traffic subject to grain proportional and reshipping rates subject to docket No. 29885 prescribed divisions, both categories having been excluded for the reason that no evidence thereon was introduced by an official territory respondent, (3) border traffic between border points and official territory which was the subject of litigation in docket No. 32055 (the parties have stipulated that this traffic is not in issue), (4) Norfolk Southern general traffic between stations on that line and points in official territory, having been excluded because docket No. 29885 divisions were not prescribed thereon and that respondent made a separate presentation thereof in a study including its overhead traffic, and (5) traffic to and from Morehead City, N.C., on the Atlantic & East Carolina, having been excluded for the same reasons as in (4) above.

Northern lines' general traffic study.—The northern lines' general traffic study embracing traffic for the months of March and September 1956 was expanded to a year's basis by multiplying by six. This study, so expanded, embraced a movement of 983,664 cars, 28,416,839.4 tons, with total revenue of $450,909,348. Northbound traffic exceeded the southbound by substantial amounts. About 70 percent of the carloads and 74 percent of the through revenue were in the manufacturers and miscellaneous category. About 75 percent moved in boxcars and refrigerator cars. As in the original case (the first 1953 report), the most important interchange points were Cincinnati, Richmond, and Potomac Yard, Va., with over half being interchanged at Varginia gateways, the remainder at the Ohio River crossings.

The average hauls on the general traffic per car-mile and per ton-mile are shown below:

8

Car-miles	*North* *Miles*	*South* *Miles*	*Total* *Miles*
Route of movement	408	519	927
Short line	362	475	837
Ton-miles			
Route of movement	392	508	900
Short line	347	464	811

The average hauls of the northbound traffic (not including Florida vegetables) in the southern lines' general 1947 study (based on average short-line ton-miles) were 370 miles in the North and 500 miles in the South, and of the southbound, 325 miles in the North and 440 miles in the South. On the same basis, the present northern lines' general traffic study shows on northbound traffic, 371 miles in the North and 496 miles in the South, on southbound, 313 miles in the North and 419 miles in the South, and on total traffic 347 miles in the North and 464 miles in the South, compared with the 1947 study figures of 345 miles north and 478 miles south.

The total revenue of $450,909,348, including the arbitraries was divided between the two groups, 45.44 percent north and 54.56 percent south. The study shows that the northern lines performed 42.8 percent of the short-line ton-miles of service, and 44 percent of actual route of movement car-miles, the southern lines 57.2 and 56 percent, respectively.

The citrus fruit and vegetables study.—This northern lines' study, also developed by sampling, covered the movement of these commodities from southern territory to points in official territory on lines of the northern lines for the 5 months, January through May 1956, and embraced 43,810 cars (713,618 tons). The total revenue was $19,660,843, which was settled 33.38 percent North and 66.62 percent South. The northern carriers performed 29.4 percent of the short-line ton-miles of service, the southern, 70.6 per-

cent. The preponderance of this traffic moved through Richmond and Potomac Yard. Cincinnati was the important Ohio River gateway.

The following table shows the average short-line hauls on this traffic:

9

	Short-line miles		
Car-miles	*North*	*South*	*Total*
Citrus fruit	356	830	1,186
Vegetables	360	893	1,253
Weighted average	359	871	1,230
Ton-miles			
Citrus fruit	355	830	1,185
Vegetables	361	890	1,251
Weighted average	358	860	1,218

Southern lines' study.—This study for the 12-month period July 1958 to June 1959 produced an estimated total of 967,554 cars containing 28,055,720.7 tons of freight yielding total through freight revenue of $496,086,766, including arbitraries totalling $1,365,705. The study included traffic originating or terminating on western or southern lines in official territory when a northern line participated in the haul, and, as stated above, coal and coke made from coal and certain other classes of traffic, not considered by the southern lines as here in issue, were not included in the final tabulations.

By directional flow, by commodity groups, and by types of equipment, this study follows closely those characteristics as produced in the northern lines' study. As in the northern study, Cincinnati led as the principal primary breakpoint, with Richmond and Potomac Yard in second and third place. Of the total cars embraced in the study, 55.4 percent passed through the Ohio River-Illinois-Kentucky gateways, and 44.6 percent through the Virginia gateways.

The average hauls per car and per ton, both route-of-movement and short-line, for the total traffic included in the study are shown below:

	North	*South*	*Total*
Per car	*Miles*	*Miles*	*Miles*
Route of movement	420	567	987
Short line	372	522	894
Per ton			
Route of movement	410	557	967
Short line	361	511	872

10

The following table compares the "as settled" division of the total through revenue in the two groups' studies:

	Combined northern lines' studies, including arbitraries	*Southern lines' study*	
		Including arbitraries	*Excluding arbitraries*
	Percent	*Percent*	*Percent*
North	44.93	44.64	44.75
South	55.07	55.36	55.25

The northern lines point out that the southern study is subject to criticism for failure to include Norfolk Southern traffic so as to permit such traffic to be considered separately or together with Southern traffic as a whole. As stated, the Norfolk Southern submitted a separate presentation for itself with respect to traffic originating or terminating on its line and passing over its line to or from stations on the Atlantic & East Carolina and the Beaufort & Morehead. The divisional situation as to these lines is the subject of later discussion herein. Inclusion of Norfolk Southern originated or terminated traffic reduces by 8 miles the average haul in the South, based on average short-line ton-miles.

Preliminary conclusions as to the traffic studies.—The studies of the two groups are basically similar as to the

general characteristics of the traffic. The least similar results are the average hauls. These differences may be accounted for principally in the difference in the periods studied as well as the inclusion or exclusion of certain traffic in the one and not in the other. The northern study does not include an estimated annual movement of 46,201 cars which originated or terminated on western district lines on which the northern lines performed only intermediate service. Also excluded was traffic (4,092 cars) to or from southern lines' stations in official territory on which the northern lines performed only intermediate service. A third category not included in the northern lines' study (2,955 cars) which the southern study embraces was traffic between the South and Canadian points moving on combination rates breaking at the international boundary on which the revenue accruing to domestic carriers is divided on the 1953 prescribed basis. On the other hand, the northern study includes traffic between points on the Norfolk & Western in southern territory and points in official territory. The extent of this traffic is not revealed but its inclusion tends to understate the southern lines' average haul since such traffic always has a relatively short haul in the South.

11

The northern study does not reflect the changes in effective divisions which have occurred since 1956, brought about by vacation of the 1953 order as to certain categories of traffic as requested by mutual petitions. Thus, the "as settled" revenue which the northern lines received is understated under present divisional bases. This is particularly true as to vegetables. Since 1957 most vegetable traffic to the New York rate group has moved on per-car rates, the divisions thereon providing that the charge of $57 per car in the New York City rates, over and above the rates to Jersey City, N. J., shall accrue to the delivering lines before prorating. Thus, the northern lines' study shows that during the first 5 months of 1956 the northern lines received 32.23 percent of the "as settled" revenue on

northbound fresh vegetables whereas the southern lines' study of 21,785 cars of fresh vegetables moved in a year subsequent to the establishment of the per-car rates shows the northern lines received 35.28 percent. The southern study includes vacated order traffic: (1) liquid soda and soda ash from Saltville, Va., to Kingsport and Port Rayon, Tenn., and (2) peaches and fresh vegetables moving on per car rates to piers 22, 27, 28, and 29 at New York City. These two categories represent only 1,209 cars, an inclusion of little significance, but the divisions thereon remain in issue here as do the divisions on trailer-on-flatcar traffic not covered by stipulation of the parties.

We agree with the aforementioned characterization by the southern lines, stated earlier, as to the evidentiary worth of their traffic study. The basic abstract sample of southern lines consists of 100 percent of those abstracts covering $10,000 or more of revenue ("A" abstracts) with a 5-percent random sample of the remaining abstracts ("B" abstracts). The northern lines accepted the reliability of the southern lines' study by using it as the basis for their own final cost computations, and we have used the service units produced by the study in our restatement of the costs. Moreover, a careful consideration of the traffic studies and the abstract samples reveals that there are typical and ample representations of the roads involved, large and small, covering typical movements in ample number for a normal annual period with appropriate adjustments to reflect seasonal variations. A totalling of the divisions on particular traffic (which reflects the rates involved) permits an appropriate consideration of individual carriers and their movements.

12

ECONOMIC TRENDS

At pages 501-505 of the first 1953 report, 287 I.C.C. 497, various statistical comparisons were set forth which supported a conclusion "that in the past 20 years the South has bettered its relative economic position in comparison

with the North" and "that the southern railroads have benefited from this improvement in the economic situation of the South." The record in this reopened phase indicates a continuation of these trends. The number of employees in the South in 1958 increased 28 percent over 1947, the number in the North was approximately the same in 1958 as in 1947, while there was an increase of 12 percent for the entire country. In absolute figures, the North in 1958 had almost 10 million employed persons, 5 times as many as the South. The value of manufactures for the Nation almost doubled between 1947 and 1958. It increased about 67 percent in the North, and slightly more than doubled in the South. From 1930 to 1958 the population of the United States increased 41 percent and in the southern States, 44 percent. The percentage population gains during the 20 years 1930 to 1950 were 22.7 percent for the entire country, 24.5 percent in the South, and 18.8 percent in the North, as shown in the 1953 report. A southern respondent in 1960 represented "that the South's economic development since World War II has outpaced the national rate of growth in practically every category you can name." Data adduced also show increases for the South of 40 percent in the number of manufacturing establishments, and 57 percent in the number of industrial and commercial firms, compared with respective national increases of 26 and 25 percent.

However, the South, as an area, was below national levels in several respects on a per capita basis. In 1956 manufacturers' expenditures for new plants and equipment per capita in the South were $48 as compared with $67 on a national level. In the same year value added by manufacture per capita in the South was $500 as compared with $835 in the Nation. In 1955, total bank assets per capita in the South were $670, or 48 percent of the national level of $1,398. The total value of farm products sold per capita in the South in 1954 was $131 as compared with $153 in the

Nation, while retail sales per capita in that year were $815 in the South compared with the national average of $1,054.

Operating and Revenue Results

There has been a relatively greater increase in freight traffic in the South than in official territory since 1947. The number of cars and tons handled within the South in 1958 were 100.40 and 120.21 percent, respectively, of that for 1947 while corresponding percentages for official territory were 64.14 and 68.19. Revenue ton-miles for the southern region in 1958 were 99.6 percent of those shown for 1947, and revenue tonnage originated and terminated in 1958 was 105.5 and 113.6 percent, respectively, of that handled in 1950. Corresponding percentages for the eastern district and Pocahontas region were for revenue ton-miles, 85.4 percent, and for tons originated and terminated, 77.3 and 77.5 percent, respectively. Revenue tons originated and terminated in the entire country in 1958 were 87.9 and 91.3 percent, respectively, of that in 1950.

As shown below, there has been a relatively greater increase in freight revenue of the southern lines since 1950 than in that of the northern lines:

Freight revenue	*Southern region*		*Eastern district and Pocahontas region*	
for—	*Amount*	*Percent*	*Amount*	*Percent*
1950	$1,098,229,000	100	$3,374,542,000	100
1958	1,175,318,000	107	3,217,516,000	95.3

The average net ton-miles of revenue and nonrevenue freight per annum in the southern region for 1956-58, 91.8 billion, were 2.1 billion more than those for 1950, and 37.9 billion greater than in 1940. The annual average for the eastern district and the Pocahontas region in 1956-58 was 253.2 billion, 6.3 billion less than in 1950, and 53.8 billion greater than in 1940.

In the first 1953 report, 287 I.C.C. at page 503, the operating ratios of the two groups of carriers shown for the

years 1941-50 indicate that ratios for the southern lines were consistently below the ratios of the northern lines. The present record does not show freight operating ratios separately. The total operating ratios continue to favor the southern lines as shown below:

Year	*Southern region*	*Eastern district and Pocahontas region*
	Percent	*Percent*
1951	75.14	79.58
1952	73.26	79.03
1953	72.64	78.79
1954	76.00	81.14
1955	72.79	77.09
1956	74.73	77.62
1957	77.68	79.53
1958	78.61	81.20
1959	76.22	80.52

14

The first 1953 report also showed that the increase in net railway operating income received by the southern lines in the period 1941-51 had been relatively larger than for the northern lines. Continuation of that trend is shown below:

Net railway operating income

Annual average for—	*Southern region*		*Eastern district and Pocahontas region*	
	Millions	*Percent*	*Millions*	*Percent*
1948-53	$157.8	100	$395.4	100
1954-59	162.4	103	361.1	91

The above table reflects operations of the two groups for the 6 full years prior to and after the presently prescribed divisions became effective under which the prior divisions giving the southern lines on general traffic a 25-percent factor advantage was eliminated. Revenue in 1956 for the northern lines from the traffic at issue was 6 percent of their total freight revenues, while for the southern lines the percentage was 21.4.

Rates of return on depreciated book investment, set forth in the first 1953 report, 287 I.C.C. at page 503, indicate that for the years 1941 to 1951 those for the southern lines consistently exceeded those for the northern lines. In this phase of the instant proceeding, the rates of return based on the net investment [4] are as follows:

Year	*Southern region percent return*	*Eastern district and Pocahontas region percent return*
1952	5.27	3.86
1953	5.45	4.01
1954	4.48	2.89
1955	5.45	4.19
1956	5.02	4.05
1957	4.14	3.29
1958	3.68	2.00
1959	3.63	2.27

Again comparing these statistics for the 6 full years since the present divisions became effective with the 6 years prior thereto, the average rate of return (net investment method) for the southern lines was 4.40 percent in 1954-59 and 4.79 percent in 1948-53, while the northern lines' average was 3.11 and 3.60 percent, respectively.

The southern lines take the position that returns for the calendar years 1958 and 1959 should not be used for comparative purposes to determine future divisions in view of the recession in business activity affecting the first half of 1958 and the severe steel strike affecting the last half of 1959, which affected the northern lines to a greater degree than the southern lines. The rates of return of both groups for these years were lower than for any other year since 1949. A comparison, omitting 1958 and 1959, shows average annual rates of return for the southern lines, 1954-57, 4.77

4. The net investment method is the carriers' investment in road and equipment, material and supplies, and cash, less accrued depreciation and amortization at the end of the year under consideration.

percent and 1950-53, 5.19 percent and for the northern lines during the same respective periods, 3.60 and 3.76 percent. Thus, the spread between the two groups in the 4-year period before the present divisions became effective, 1.43 percentage points, was reduced to 1.17 in the like period subsequent thereto.

The following table shows changes in revenue per ton and revenue per ton-mile for the two groups in the first 4 years since the present divisions became effective:

	Official territory		*Southern region*	
	Revenue per ton	*Revenue per ton-mile*	*Revenue per ton*	*Revenue per ton-mile*
Year		*Cents*		*Cents*
1954	$2.98	1.55	$2.98	1.46
1955	2.91	1.48	2.89	1.40
1956	2.95	1.49	2.82	1.43
1957	3.14	1.56	2.97	1.48

The southern lines observe that the location of new industries in the South near abundant sources of raw materials has meant that the long-haul movement of manufactured products into the South has been replaced by the movement of low-rated raw materials to nearby plants. Increased population in the South has caused finished products to be consumed locally, and the southern lines contend that they are left with less remunerative movements of low-rated raw materials. As an example, the Seaboard handled 33.9 percent more tonnage of low-rated commodities in 1959 than it did in 1951. Between the same years its tonnage of high-rated traffic increased only 5.6 percent. Its revenue increases in the same period were 28.7 percent on low-rated and 2.4 percent on high-rated commodities. The northern lines' tonnage and revenues in the eastern district for both groups of commodities decreased in 1959 compared with 1951. The decrease on low-grade tonnage and revenues was 27.4 and 15.8 percent, re-

16

spectively, while on high-grade, 22.4 and 15.2 percent, respectively.

In August 1959, 12.1 percent of the northern lines' cars were undergoing or awaiting repairs; the figure for the southern lines was 5.3 percent. In July 1959, 6.7 percent of the North's locomotives were in or awaiting shop; for the South, 3.1 percent. Using the 4-year period of 1950-53 as a base index of 100 for new rail laid in replacement, the northern lines' indices were 60.6, 60.9, 56.6, 54.4, and 20.5 in the 5 years, 1954-58, respectively, while the respective indices for the southern region roads were 101.2, 90.9, 76.7, 80.7, and 49.8. Indices for crosstie and secondhand rail replacements in the two groups follow similar patterns during the same 5-year period.

The first 1953 report, 287 I.C.C. at page 505, discussed the efforts by each group to show that its revenue was more adversely affected by motor and water competition. However, it was not found there that such competition would be felt more keenly in the future by one group than by the other. Facts respecting such matters, including truck registration, highway construction, truck versus rail tonnage, revenue, and ton-mile revenue, waterborne diversions, and competitive rate reductions, were shown. However, those factors are not shown to have a measurably greater effect on one group as against the other on interterritorial traffic. We find that no adjustment of divisions is in order as a result of competition from other modes of transport.

Efficiency of Operation

In prescribing divisions the Commission is required by section 15(6) of the act to "give due consideration, among other things, to the efficiency with which the carriers concerned are operated." In the original phase of this case the relative efficiency of the northern lines was the subject of substantial evidence directed to support the southern lines' assertion that "performance in the North reflects

less efficient operation than in the South." After reviewing the various statistical indicators of efficiency in the prior record, it was stated at page 519 of the first 1953 report: "In our opinion the figures disprove the charge that the northern lines are less efficiently operated than the southern lines * * *."

17 In this reopened phase, the southern lines do not question the relative efficiency, as such, of their opponents. Instead, they charge that the northern lines have been unwise in choosing to devote available funds to reduction of debt rather than making capital improvements in their transportation plant, that the primary problem confronting the northern lines must be met through the elimination of duplicate facilities and modernization of railroad plant, and that cost savings are available to those lines through elimination of excess and duplicate facilities.

The northern lines assert that the same conclusion as to relative efficiency as made in the first 1953 report is warranted upon this record. It was there stated at page 525:

> We do not interpret section 15(6) as requiring us to determine whether one group of carriers is more or less efficiently operated than another, but rather to give due consideration to any evidence which might tend to indicate that the showing as to cost of service is affected by wasteful or inefficient management.

The record shows that the traffic density in the North is appreciably greater than in the South. From this fact the southern lines reason that the unit costs shown in Rail Form A for recent years for the northern lines should be lower than for the southern lines. However, many factors other than density, as will be hereinafter discussed, affect the operating expenses of a group of railroads. In any event, railroads in the North, including the larger ones, are shown to be in the process of eliminating unnecessary facilities

and services. At the same time, the evidence shows that the northern lines exercised their best managerial judgment, when faced with rising debt, in dealing with problems affecting the cost of service at the time they were encountered. We find no basis for giving effect to criticism of such action. Nor is there a basis for criticizing the judgment of southern lines in expanding and developing their operations. Also the record does not establish that the northern lines' costs are overstated relative to the southern lines' costs as a result of differences in the timing of the modernization programs in each territory. It is true that the savings expected from proposed mergers and consolidations are not reflected in the cost studies of record. However, the southern lines themselves have noted that mergers are now going forward in all territories, including the South. If and when such proposed mergers are ultimately approved and finally consummated in both groups the savings produced thereby will be then reflected in the respective unit costs. The economies hoped to be effected thereby
18 and the savings exepected are not ascertainable for future operation to the degree required for any specific adjustment here of the cost studies of record. We find upon this record that the northern lines' cost of service is not shown to be affected by purported waste or inefficiency. More affirmatively, we find that both groups are being operated efficiently and that neither group should be considered as more or less efficient than the other.

Relative Cost of Service

It was stated in the first 1953 report, when prescribing the present divisions, that: "* * * it is to be the safest assumption for the future upon the facts before us that neither contesting group will have an appreciably lower basis of operating costs than the other, * * *." 287 I.C.C. at page 526. To demonstrate changed conditions, the northern lines presented evidence as to the relationship of territorial average costs, the trend of those costs over a period

of years, and the cost of moving the traffic at issue based on territorial average unit costs applied to traffic samples. They contend that their cost evidence reflects higher costs in the North than in the South for equivalent hauls and loads, that the difference has increased over a period of years, and that the division of the revenues which they receive for hauling the traffic at issue is less than their proportion of the costs of hauling it, thus proving the aforesaid assumption was not well founded.

The basic formula used by both parties was Rail Form A, entitled "Formula for Use in Determining Rail Freight Service Costs," which utilizes the expenses and statistics for a given year as reported to this Commission by the carriers as well as supplemental data derived from special studies made by the carriers. The traffic here at issue moves over three statistical and cost territories: the southern region south of the divisional breakpoints, the eastern district, and the Pocahontas region north of the breakpoints or border. The northern lines rely in these proceedigns upon eastern district territorial costs as developed by Rail Form A. It is their view that such Rail Form A costs—unadjusted—should be used to measure the relative costs of service for the two groups of carriers involved.

The southern lines contend that eastern district territorial costs are appropriate only for the eastern district, and that Pocahontas region costs should be used for the Pocahontas carriers; or that at least official territory cost should be used for official territory (made up of eastern district and Pocahontas region). It is also their view that territorial costs should be somewhat narrowed down to the North-South traffic in issue. Endeavoring to adjust Rail Form A costs to the interterritorial traffic in issue, there are a number of adjustments presented by the southern lines purportedly improving the accuracy of the territorial costs for the two groups of carriers. These adjustments are dealt with in full in subsequent treatment of this subject.

The following table shows the relative participation of the carriers in the traffic at issue as shown in the southern traffic study.

	Cars originated or terminated	*Percent*	*Car-miles*	*Percent*
Official-southern traffic north of gateway:				
Eastern district roads	769,700	79.55	276,278,108	67.98
Pocahontas roads	130,877	13.53	95,562,990	23.51
Class II roads ..	16,697	1.73	417,948	.10
Southern lines in official territory	4,092	.42	24,030,862	5.91
Western lines in official territory	46,201	4.77	10,108,571	2.49
Total	967,567	100.00	406,398,479	99.99
All traffic:				
Eastern district ..	25,434,220	——	6,124,710,420	——
Pocahontas region	5,056,002	16.6	1,397,141,776	18.6
Official	30,490,222	——	7,521,852,196	——
Official-southern traffic south of gateway:				
Southern region roads	894,461	92.44	532,811,465	97.15
Pocahontas roads	0	——	3,006,325	.55
Class II roads ...	55,829	5.77	3,228,070	.59
Western district roads	17,277	1.79	9,412,641	1.72
Total	967,567	100.00	548,458,501	100.01

The participation of the Pocahontas lines in the traffic at issue compared to all traffic is less when measured by cars originated and terminated and more when measured by car-miles. One is related to terminal costs and the other to line-haul costs. A part of the traffic at issue is carried over those portions of southern lines which extend into official territory and over those portions of western lines which extend into official territory and southern re-

gion. The relative participation of the Pocahontas lines in the issue traffic is not shown to be sufficiently different than in the total traffic so as to require separate costing, nor is there any sound evidentiary basis for applying western district costs to traffic moving in official territory which is carried on western lines which lap over into that territory. In view of the foregoing, we find that the most appropriate and reasonable approach to the determination of costs in official territory is the alternative urged by the southern lines; that is, official territory, costs for all traffic north of the gateways. A comparable basis in the South necessitates the use of southern region costs on traffic south of the gateways.

The northern lines presented evidence to show that the average unit costs for comparable service are higher in the North than in the South. The following summary table illustrates this point. The first six lines are based on the northern lines' application of Rail Form A and the last four lines on our cost section's application in its annual studies. These costs include a terminal service at one end only, reflect short-line miles, and are based on a load of 28.9 tons in boxcars.

Relation of northern to southern freight service costs

	100 miles	*300 miles*	*500 miles*	*1,000 miles*
	Percent	*Percent*	*Percent*	*Percent*
Official territory vs. South:				
1948	119	113	111	109
1956	131	123	120	117
1957	131	122	120	117
Eastern district vs. South:				
1948	125	119	117	116
1956	141	131	128	126
1957	141	132	130	126
Eastern district vs. South (cost section study):				
1948	124	116	115	113
1956	143	133	129	127
1957	143	133	131	128
1959	154	143	139	136

These costs indicate that levels thereof are higher in the North than in the South for like services, that official territory costs are not quite as high as eastern district costs, and that the northern lines' application of Rail Form A as compared to the cost section's study application results in a slightly lower relationship, particularly in more recent years.

The northern lines' application of Rail Form A differs from that of the cost section's annual studies in the following respects: (*a*) the use of a 6-percent rate of re-
21 turn without provision for Federal income tax in place of a 4-percent rate of return with provision for Federal income tax; (*b*) the base for return is book investment in road and equipment plus cash and material and supplies less recorded depreciation and amortization instead of on the basis of original costs except lands and rights, working capital, including material and supplies, less recorded depreciation and normalized amortization, plus the present value of land and rights; (*c*) the less-than-carload and passenger deficits are omitted from the constant costs; and (*d*) none of the costs of switching and terminal companies is included.

The northern lines' evidence as to the trends of relative costs over a period of years can best be summarized in tabular form as follows:

Northern percentage of total Form A costs at average hauls

	Citrus and vegetable traffic, refrigerator car— 16.3 tons	*General traffic, boxcar— 28.9 tons*
Average haul-miles:		
North	358	347
South	860	464

	Official territory	*Eastern district*	*Official territory*	*Eastern district*
	Percent	*Percent*	*Percent*	*Percent*
Northern lines' Form A computation:				
Year 1948	32.3	33.3	46.4	47.8
Year 1950	33.5	34.2	48.8	50.1
Year 1952	33.8	34.7	48.8	50.1
Year 1954	33.1	34.7	49.7	51.0
Year 1956	33.9	35.0	48.8	50.5
Year 1957	34.1	35.5	48.8	50.8

22

	Citrus and vegetable traffic, eastern district		*General traffic, eastern district*	
	Fully distributed costs	*Out-of-pocket costs*	*Fully distributed costs*	*Out-of-pocket costs*
	Percent	*Percent*	*Percent*	*Percent*
Form A cost from cost section annual study:				
Year 1947 as of Jan 1, 1949	32.9	33.5	47.0	49.0
Year 1948 as of Jan. 1, 1950	33.3	34.1	47.4	49.7
Year 1949 as of Jan. 1, 1951	31.9	31.8	46.7	47.5
Year 1950 as of Jan. 1, 1952	34.2	34.4	49.7	51.2
Year 1951 as of Jan. 1, 1953	34.5	34.5	49.9	50.8
Year 1952 as of Jan. 1, 1954	34.7	34.8	50.2	51.1
Year 1953 as of Jan. 1, 1955	34.2	34.3	50.0	51.2
Year 1954 as of Jan. 1, 1956	34.7	34.7	50.6	51.8
Year 1955 as of Jan. 1, 1957	34.9	34.9	50.5	51.5
Year 1956 as of Jan. 1, 1958	35.5	35.7	50.7	51.8

In the southern lines' traffic study, 69.3 percent of all car-miles were run by boxcars and 9.7 percent by refrigerator cars. The table above indicates that there was an increase in the northern lines' proportion of costs in the year 1950 but that the trend since that year is not pronounced. As to boxcar costs, the northern lines' computation shows no increase for official territory between 1950 and 1957 and only 0.7 percent for eastern district.

The out-of-pocket boxcar costs, based on our cost section's annual study, showed 0.6-percent increase from January 1, 1952, to January 1, 1958.

The northern lines priced out the traffic at issue as measured by their own traffic study both on the basis of Rail Form A unit costs of their own computation and on the basis of Rail Form A unit costs as computed by our cost section's studies. They also applied the cost section's unit costs to the southern lines' traffic study. The cost section costs used were at the fully distributed level; i.e., they included a ton and ton-mile apportionment of the constant costs. All costs were based on the year 1956 and included an allowance for loss and damage. The table following shows for each traffic study, the percentage of revenues received by the northern lines, and the percentage of costs incurred by them:

23

	General traffic (percent)			*Citrus and fresh vegetables (percent)*		
	Revenue	*Cost*	*Difference*	*Revenue*	*Cost*	*Difference*
Northern lines' traffic study:	45.44	——	——	33.38	——	——
Northern costs:						
Eastern district vs. southern region	——	49.78	4.34	——	34.62	1.24
Cost section study costs:						
Official territory vs. southern region ..	——	48.19	2.75	——	34.00	0.62
Eastern district vs. southern region ..	——	50.18	4.74	——	35.26	1.88
Southern lines' traffic study:	44.97	——	——	34.63	——	——
Cost section study costs:						
Official territory vs. southern region ..	——	47.34	2.37	——	33.69	(.94)
Eastern district vs. southern region ..	——	49.31	4.34	——	34.97	.34

The difference in the results for citrus and fresh vegetable traffic as between the two traffic studies reflects a revision in the divisions. The more recent southern lines' traffic study shows that the revenues as settled and the costs on this traffic are roughly equal. The following table indicates the dollar amounts involved on the general traffic:

	Traffic study of northern lines			*Traffic study of southern lines*		
	Percent		*Percent*	*Percent*		*Percent*
Total revenue ...	100.00	$450,909,348		100.00	$480,160,317	
Northern lines' share:						
Revenues as settled	45.44	204,889,448	100.00	44.97	215,915,212	100.00
Revenue if based on costs:						
Northern lines' costs ...	49.78	224,462,673				
Increase		19,573,225	9.6			
Cost section study costs:						
Official vs. southern ..	48.19	217,293,215		47.34	227,307,894	
Increase		12,403,767	6.1		11,392,682	5.3
Eastern vs. southern ..	50.18	226,266,311		49.31	236,767,052	
Increase		21,376,863	10.4		20,851,840	9.7

24 The southern lines urge that it is settled law that relative service costs are the decisive measure in determining just and reasonable divisions and that the costs of all roads participating in the official-southern traffic should be so applied and adjusted as to reflect the cost characteristics of the traffic here at issue. In order to develop the relative service costs of this traffic they applied Rail Form A adjusted unit costs at the fully distributed level for the year 1956 to their traffic sample described above. They presented the results of their cost studies in several different forms, but their principal cost evidence can be summarized as shown in the table below. It starts with the application of the costs as computed by the northern lines applied to the southern lines' traffic

study, then the unadjusted Form A costs applied to the same study, and lastly the Form A costs modified to include the effect of 12 adjustments they deem necessary.

	North of gateway	*South of gateway*	*Percent* North	South
Total revenues as settled under present divisions	$221,430,000	$274,656,000	44.64	55.36
Northern lines' costs applied to southern traffic study:				
Eastern district and southern region	158,427,000	170,708,000	48.13	51.87
Official territory and southern region	148,424,000	170,708,000	46.51	53.49
Unadjusted Rail Form A costs—official territory and southern region ..	169,618,000	194,306,000	46.61	53.39
Rail Form A costs including 12 adjustments	152,808,000	201,916,000	43.08	56.92

All of these costs are territorial average costs based on the expenses and operations for 1956, all are at the fully distributed level, and all are applied to the southern lines' traffic study.

The unadjusted Rail Form A costs above result from the standard computation applied to each territory. The specific adjustments made by the southern lines in the unadjusted official territory and southern region unit costs developed by cost section annual studies are discussed in appendix B hereto in full detail.

Restatement.—The differences between the parties as to the cost evidence run to the degree to which territorial average costs should be modified to fit the specific traffic at issue, and to the meaning and significance of various data and statistics.

·25 Both parties computed the cost of service based on the southern lines' traffic study and the territorial average costs (1956) in statement No. 2-58, Rail Carload Cost Scales by Territories, prepared by the cost finding section. The southern lines computed costs for all traffic for official territory and southern region and the northern lines computed costs for general traffic (all traffic except citrus fruits and fresh or green vegetables, not frozen, northbound) and citrus and vegetable traffic separately for official territory, eastern district, and southern region. The cost computation of each side furnished substantial verification of that of the other side. Further, positive verification was made by applying the unit costs in statement No. 2-58 to the service units by type of car. The assertion made by the northern lines that the southern lines omitted 70 percent of the cars in the traffic sample from their cost studies is not true of the latter's final cost presentation.

Our restatement is based on official territory (eastern district plus Pocahontas region) costs north of the breakpoints, for reasons previously discussed, and is at the fully distributed level,[5] as advocated by both groups, on all traffic. Apart from the adjustments rejected in appendix B, our restatement is based on the southern lines' cost computation, as applied to their traffic studies, which, we find, more reliably and accurately reflect the movement of the traffic in question. Incorporating the five adjustments advocated by the southern lines which we have found appropriate, our restatement is shown in the following table:

Restated costs

All traffic	*Official territory*	*Southern region*
Revenue as settled	$221,430,341	$274,656,425
Percent	44.64	55.36
Fully distributed costs—unadjusted	169,617,543	194,306,309
Percent	46.61	53.39

5. As found appropriate in *Louisville & N.R. Co. v. Southern Ry. Co.*, 319 I.C.C. 639, 660, sustained in *Carolina & N.W. Ry. Co. v. United States*, 230 F. Supp. 581 (W.D.N.C. 1964).

All traffic—continued	*Official territory*	*Southern territory*
Adjustments:		
Exclude platform cost	$—2,254,075	$—453,673
Way and thru train separation	—2,283,259	—3,595,230
Switching and terminal companies	—163,473	+1,039,610
Include short line (class II railroads) costs	—37,725	+529,347
Train tonnage—		
Pocahontas region	+867,319	0
Total adjustment (net)	—3,871,213	—2,479,946
Fully distributed costs—adjusted	$165,746,330	$191,826,363
Percent	46.35348	53.64682

As indicated, we have fully reviewed in appendix B and restated above the costs as presented by the parties. In addition, however, the southern lines urge that the evaluation of certain factors bearing upon costs establishes that their cost study overstates the costs of the northern lines relative to the costs in the South, all to the general effect that their showing of the northern lines' costs should be reduced by at least 5 percent. These factors include: (1) overstatement of line-haul costs, (2) costs of interchanges between northern and southern carriers, (3) differences in the timing of modernization programs in each territory, and (4) savings which would result from "necessary" elimination of alleged excess capacity and duplicate facilities. The only item to which they attach a cost figure relates to the equalization of gateway interchanges, amounting to $1.6 million. We have discussed this item in appendix B, pointing out our reasons why such an adjustment is not warranted. As to the remainder, they agree that a precise cost figure cannot be ascertained. We have fully considered these factors, and are of the opinion that the service unit costs as determined by the application of Rail Form A, as adjusted, adequately reflect the costs which are

attributable to the traffic at issue. Our overall appraisal of this evidence is reflected in our conclusions and findings.

IMPORTANCE TO THE PUBLIC

Section 15(6) of the act also requires that we give due consideration to the importance to the public of the transportation services of the concerned carriers. No real issue exists between the contending railroad groups themselves in this respect. Each group is considered to be of equal importance to the public.

27

The prior phase of this proceeding was viewed primarily as a struggle between the railroads. In this reopened phase, however, certain interests representing public bodies adduced evidence in support of the southern lines. The Southern Governors' Conference [6] and the Southeastern Association of Railroad & Utilities Commissions [7] endeavored to show why the divisions of the northern lines should not be increased. Unlike the request of the southern lines, their requested finding is that equal factor divisions should be maintained. These interveners contend that a shift of divisions from the southern lines would result in higher rates on southern and interterritorial and intraterritorial traffic, and diminution of services, facilities, and equipment. Thus, they foresee the impairment of the ability of southern shippers to compete in distant markets and diversion to other modes of transportation, thereby impeding the economic growth of the South.

In their exceptions, the southern interveners urge that the examiners failed to give effect to the overriding demands of the public interest which, they say, require uniformity in these divisions. We recognize that the public

6. In this proceeding, composed of the Governors of Alabama, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.

7. Composed of State commissions and their members charged with the regulation of common carriers and other public utilities in the States named in footnote 6.

interest must be considered and the importance to the public of the transportation services of the railroads is not a sectional concept. We are required under the act to preserve an adequate national system of transportation, and must therefore consider the public interest of all concerned. Such a consideration, however, does not by any means require a uniformity of divisions, nor can we find an affirmative virtue in it on this record. *Cf. Western Trunklines* case, 225 F. Supp. at page 604. Moreover, as pointed out in *New England Divisions Case,* 261 U.S. 184, 191 (1923), section 15(6) was designed to help the weak "by preventing needed revenue from passing to prosperous connections." Thus, an adherence to uniformity as such, without a careful evaluation of the statutory criteria and the evidence of record, can hardly result in the fixing of just, reasonable, and equitable shares.

Relying on *New York v. United States,* 331 U.S. 284, 315 (1947), the interveners also take the position that natural disadvantages must be found in the North before we may increase the divisions of the northern railroads. In essence, however, other factors being equal, cost differences generally are the product of, and reflect, the inherent advantages and disadvantages that go to make up the respective overall transportation conditions in the two territories. *Cf. Louisville & N. R. Co. v. Southern Ry. Co.,* 319 I.C.C. 639 at pages 646-47. Moreover, in the *New York* decision, a discriminatory class rate structure was found not justified by territorial conditions. No similar showing as to existing divisions has been demonstrated here by interveners. Indeed, the continued maintenance of divisions which, all other things being equal, do not reflect the relative costs of service would not suggest justice as between the parties. Such inequities being manifest here, we are of the opinion that divisions correcting them can result in no unlawful injury to the South.

28

In sum, we find that there are no differences in importance to the public attributable to the two contending groups of railroads.

DIVIDING POINTS AND DIVISIONS ON PARTICULAR MOVEMENTS

Dividing points.—In this reopened phase the northern lines again urge that the construction of divisions over fictional breakpoints rather than over actual points of interior interchange results in unjust inflation of southern revenues. They request a finding that the dividing points to and from which primary divisions shall apply are the points at which the traffic is interchanged between a northern and southern line.

This problem has been a difficult one ever since these general North-South divisions were first considered in docket No. 24160, the northern lines always contending that actual interchange points should govern, while the southern lines strenuously urged that the primary dividing points should be at the territorial border. In the original 1939 report in docket No. 24160 the Commission found for the northern lines, but reversed its initial determination in the report on reconsideration, 238 I.C.C. 149. Subsequent thereto, the interested lines in 1944 entered into what is known as the Roanoke Agreement as a compromise on traffic moving through the Ohio River gateways to points in central and Illinois territories. Details of this agreement, with which the northern lines are dissatisfied, are stated at page 528 of the first 1953 report, and need not be repeated here.

29 In the first 1953 report the Commission again agreed with the northern lines' contentions but upon reargument in the second 1953 report (289 I.C.C. 4) modified the finding, holding that it would not be desirable to require the use of points in Illinois and Indiana north of the Ohio River as primary dividing points.

The southern lines' traffic test, as stated, embraced a total of 967,554 cars. Of these, 86,843 or 9 percent were interchanged at interior Illinois-Indiana junctions, the most important of which were East St. Louis, 28,783 cars, Chicago, 19,441 cars, and Indianapolis, 12,599 cars.

The following tabulation shows the number of cars so handled by individual lines:

Railroad	*Cars*		
	Northbound	*Southbound*	*Total*
Illinois Central	30,838	15,463	46,301
Gulf, M. & O.	14,476	3,680	18,156
St. Louis-San Francisco	8,832	3,129	11,961
Southern	2,880	2,219	5,099
Louisville & Nashville	2,471	2,798	5,269
Missouri Pacific	—	57	57
Totals	59,497	27,346	86,843

A comparison of the total number of cars moving through primary dividing points with those moving through these points but not interchanged follows:

Dividing points	*Total cars*	*Cars not interchanged*	
		Number	*Percent*
Cairo, Metropolis Thebes-Gale	74,504	65,470	87.9
East St. Louis	55,767	11,005	19.7
Evansville	29,342	5,269	18.0
Louisville	90,538	5,099	5.6
	250,151	86,843	34.7

The total revenue on the 86,843 carloads was $49.6 million which was settled 63.9 percent south and 36.1 percent north. If the primary break were made over the actual points of interchange, the southern lines would have received 58.4 percent, and the northern lines 41.6 percent, reflecting a reduction in southern revenue of $2.7 million, averaging $32 per car. Some 28,136 cars, or 32.4
30 percent, were handled via joint routes that would have required new subdivisional arrangements.

The examiners recommended that the border dividing points be retained as at present. They were of the opinion that the record failed to show any changed conditions since 1953 favoring the northern lines as to the dividing point

issue. The northern lines except to this recommendation but are not joined therein by the Monon and the Chicago & Eastern Illinois, two of the carriers intimately concerned with the divisional break issue.

The northern lines contend that section 15(6) of the act requires that divisions be fixed as among the several carriers, which, they contend, means that the Commission may not recognize geographic areas or rate territories in establishing primary divisions. We do not agree with this view. This argument was rejected by the Supreme Court in *New England Divisions Case, supra,* shortly after the enactment of section 15(6) in 1920. We have administered the act accordingly over the years. See, e.g., *Atlantic Coast Line R. Co. v. Arcade & A. R. Corp.*, 194 I.C.C. 729 (1933), *Divisions of Freight Rates*, 253 I.C.C. 673 (1942).

The southern lines take the position that our order of July 28, 1959, reopening this proceeding, did not contemplate any reconsideration of the dividing point issue. The order was not so restricted. If we were to adopt this contention, our consideration of the divisions on Canadian-northern Maine traffic, which these carriers admit is at issue here for the first time, would likewise not be included in this reopened phase.

In the second 1953 report, 289 I.C.C. 4, it was stated at page 8:

> Upon further consideration we are of the opinion that it may be preferable from the standpoint of carrier competition and simplicity of accounting that the divisions for the service south of any given gateway be uniform and that upon all the facts before us it would not be desirable to require the use of points in Illinois and Indiana north of the Ohio River as primary dividing points. The prescribed divisions will therefore be made applicable only to and from existing primary dividing points.

The northern lines contend that circumstances and conditions have changed since 1953, but we find nothing convincing upon which to base a conclusion to reverse that made in the above-quoted portion of the second 1953 report. The examples given in 1953 as to competitive routes and carriers are much the same today as they were then. It
31 appears that these lines simply are endeavoring to have us reconsider the situation. But the positive virtues of the uniform treatment set forth above still obtain.

The northern lines also rely on the *Border Point* case, *Louisville & N. R. Co. v. Akron, C. & Y. R. Co.*, 309 I.C.C. 491 (1960), as an indication that the southern lines have advocated, and that we have accepted, the proposition that railroads assigned to the southern territory to the extent they operate in official territory are to be treated as southern carriers. However, that proceeding concerned traffic moving between primary dividing points or to and from stations on southern territory carriers which are located south of the primary dividing points, which traffic had not been included in the evidence when the Commission's 1953 reports and orders were entered. The *Border Point* decision merely prescribed the docket No. 29885 divisions on the border point traffic of the Louisville & Nashville and the Coast Line consistent with the divisions prescribed for the border point traffic of the northern lines. It did not include traffic of those two carriers north of primary dividing points.

All things considered, we conclude and find that the divisions prescribed herein should continue to be made applicable only to and from existing primary dividing points. *Cf. Official-Southwestern Divisions*, 289 I.C.C. 11, 16 (1953). Thus, railroads assigned to southern territory in their entirety for statistical purposes will continue to be treated as southern lines for that portion of the operations south of the territory border dividing points and to be treated in

accordance with geographical fact to the extent that they operate as northern lines north of the primary dividing points. Giving consideration to the revenues which will accrue to the contending groups as a result of this finding, together with the revenue division which our prescribed general basis of divisions produces, we are of the opinion that no unjust inflation of southern revenues is occasioned thereby. Further, here as in the second 1953 report, we express no opinion as to the fairness of the method of subdividing the northern primary divisions.

Divisions of rates to and from points in official territory on western lines.—Certain western trunklines requested that the divisions on this traffic which is interchanged by them directly with the southern lines, as well as that originating or terminating on southern lines with a northern line or lines participating in the haul, should be the same as are or may be prescribed herein for the northern lines. The examiners concluded that the evidence was inade-
32 quate to support findings with respect to traffic interchanged without northern lines' participation absent a showing of the present divisions on this traffic and the relative service performed by each group. They further concluded, however, that the divisional scale prescribed for the northern lines should also apply to traffic interchanged between the western trunklines and the southern lines in which there is participation by a northern line or lines. Such traffic is presently subject to the general prescribed basis and is embraced within the southern lines' traffic study. No exceptions were filed to the examiners' conclusions. While our findings call for cost based scales rather than the form prescribed by the examiners, we agree with their ultimate conclusions as to the treatment to be accorded in both situations.

Canadian-northern Maine traffic.—The southern lines' traffic study shows 2,955 cars (3 percent of the total) moved to or from Canadian points on combination rates made over

an international boundary point, 2,227 of which were northbound, and 728 southbound. A slight controversy exists as to the divisional basis applicable to this traffic, since two southern territory lines settled divisions on 245 southbound cars on the docket No. 24160 basis. The southern lines are now, in this reopened phase, for the first time asking us to avoid any similar controversy for the future by prescribing divisions on this traffic "that reflect its demonstrated characteristic, i.e., 'overhead' traffic for the official territory part of the haul." They urge that since the northern lines perform no terminal service thereon the northern factor should be adjusted to reflect the situation.

The northern lines oppose any special basis on Canadian traffic. They point out that these joint rates are the same as the domestic rates to and from the border points and, as such, contemplate two terminal services of which southern lines perform but one. Of the 2,955 cars involved, 1,324 cars moved through the Detroit gateway. Of this number, 609 moved in connection with the Chesapeake & Ohio, indicating that that road bears a heavy expense, in addition to that entailed by normal interchange in the Detroit-Windsor area, largely because of the international character of this traffic.

A similar situation exists with respect to traffic moving between the South and destinations in northern Maine on combination rates made over Brunswick or Lewiston, Maine.

The joint revenue accruing south of these points is
33 divided on the presently prescribed general basis.

Thus, the southern lines contend that the northern lines receive compensation for a terminal service which they do not perform. The southern study embraced 3,158 cars in this category, about 90 percent of which consisted of clay from Georgia origins to papermills in northern Maine, 80 percent thereof going to Maine Central points on combinations over Brunswick. On March 16, 1960, these clay rates were superseded by single-factor joint through rates

over protest of the Maine Central. Clay traffic to Bangor & Aroostook points remained on the combination basis.

The northern lines advance several reasons why the instant Maine traffic should not be excepted from the general basis of divisions. These include characteristics peculiar, in part, to New England territory, such as lower traffic density, higher level of costs, multiline hauls north of the gateways, and lower rates of return. These lines urge that the general basis of divisions is required to compensate them fully for the services they perform.

The Commission is required under section 15(6) of the act to consider "whether any particular participating carrier is an originating, intermediate or delivering line." It has frequently recognized the fact that intermediate carriers having no service to perform in originating or delivering shipments are entitled to a lesser proportion of joint rates for that reason. *Through Routes and Joint Rates,* 174 I.C.C. 477, 485; *Official-Southwestern Divisions,* 287 I.C.C. 553, 580; *Divisions of Rates, Official and Southern Territories,* 278 I.C.C. 89, 94.

The examiners recommended that the divisions on this traffic be determined by making the northern factors thereon 75 percent of the northern general factors recommended by them. The northern lines take exception to this conclusion but recognize that there may be some merit in establishing a special basis to govern these divisions. The facts establish that as to most of this traffic the northern lines perform purely intermediate service with no terminal service involved. These lines state that under the circumstances an equitable basis would result from the use of prorating factors 26 integers less than the northern general factors. The 75-percent basis prescribed in *Divisions of Rates, Official and Southern Territories, supra,* and continued in our 1953 reports in this proceeding, applied only on grain and grain products moving on proportional and reshipping rates

and were specifically related to the unusual characteristics of that traffic. It was not intended that such divi-
34 sional basis should become a precedent of all overhead traffic. Rather, in light of the foregoing, our general discussion and conclusions, and the scales hereinafter prescribed, we are of the opinion and find that the intermediate scale set forth in our ultimate finding 3, modified so as to contain no allowance for terminal service, will be just, reasonable, and equitable for the future on Canadian-northern Maine traffic. Similar action was taken in *Official-Southwestern Divisions, supra.*

Grain and grain products.—In the 1953 reports we prescribed, as stated previously, a separate specific scale of divisions to apply to the joint proportional rates on grain and grain products from East St. Louis, Louisville and Cincinnati to points in southern territory reflecting northern factors 75 percent of the prescribed northern general factors. The evidence upon which that finding was based was principally that which was adduced at a further hearing in docket No. 24160 and made part of the record in the original phase of the instant proceeding by stipulation (287 I.C.C. 543). The examiners recommended that the northern factors covering this traffic should remain at 75 percent of the recommended northern general factors. The southern lines take exception to this conclusion on the ground that no evidence was here adduced dealing with this divisional situation. Under the circumstances, lacking such evidence, we may make no assumptions as to such traffic. The southern lines' exception must be sustained. Our ultimate findings prescribing lawful divisions will include this traffic so as to embrace all North-South traffic except that specifically excluded, and for convenient reference we will incorporate the prior finding as to grain and grain products.

PROPOSED CHANGES

The northern lines favor simple modification rather than complete revision of the present divisional scales, and

ask that we make such modifications therein as shall serve to redistribute the total revenue between the two groups with primary regard for their relative general levels of costs and relative revenue needs. They urge that because of their greater revenue need, the Commission should add 10 percentage points to the 25-percent increase that would be justified on the basis of relative costs alone, and thus prescribe, on general traffic, the present divisional factors for southern lines and the present factors increased by 35 percent for northern lines. On citrus and vegetable traffic their proposition is the same except that they ask
35 that their present factors be increased by only 15 percent. They estimate that the divisions thus proposed would increase their total revenue about $35 million annually, making the adjusted rates of return for 1959 for official territory lines 2.42 percent and for southern region lines 3.19 percent.

The northern lines ask that the divisions of the per-car rates on vegetables to New York be excluded from the general basis and a special provision be applied thereto so that the excess of $57 per car in the New York City rates over and above the rates to Jersey City shall continue to accrue to the delivering lines before prorating. No significant specific evidence was adduced in support of the sought exclusion as to the instant rates and movements. Also, the per-car rates here referred to were found unlawful and the unlawfulness was ordered removed in *Port of New York Authority v. Aberdeen & R. R. Co.*, 321 I.C.C. 738 (1964). The Commission's order therein was restrained, however, and the matter is now the subject of court litigation in the United States District Court for the Eastern District of Pennsylvania. In the circumstances, the sought provision as to such traffic does not appear appropriate. The relief sought is denied.

The northern lines also ask that we exclude the divisions of joint rates on liquid caustic soda and soda ash from Saltville, Va., to Kingsport and Port Rayon, Tenn., as to

which the existing order was vacated in response to mutual petition of the interested carriers. Again, since no evidence was offered dealing specifically with this segment of traffic, we are unable to grant such relief. Similarly, no evidence was adduced as to their request for exclusion of the divisions of joint rates on all trailer-on-flatcar traffic, nor was this request renewed in their exceptions. It is therefore denied.

The southern lines would abandon the present scales of prorating factors and substitute therefor scales constructed directly from the costs developed in their cost study which we have not accepted in its entirety, as shown in our restatement. They oppose the use of divisional scales derived from rate scales because, they contend, partly curvilinear and partly straight line rate of progression favors the short haul in the North. Omitting 50-mile block factors, except for the initial block, the scales proposed by the southern lines are shown below:

36

Distance	*Column 1 (South)*	*Column 2 (North)*	*Column 3 (North)*
50 miles	155	137	144
100 miles	214	194	204
200 miles	330	307	323
300 miles	447	421	443
400 miles	563	535	563
500 miles	680	648	682
600 miles	797	762	802
700 miles	913	875	921
800 miles	1030	989	1041
900 miles	1146	1102	1160
1,000 miles	1263	1216	1280
1,100 miles	1380	1330	1400
1,200 miles	1496	1443	1519
1,300 miles	1613	1557	1639
1,400 miles	1730	1670	1758
1,500 miles	1846	1784	1878
1,600 miles	1963	1897	1997

The scales in columns 1 and 3 are those developed directly from the southern cost study for the southern and northern portions of the hauls, respectively. Instead of using column 3 as northern factors, the southern lines would use 95 percent thereof as reflected in column 2. They contend that such an adjustment is required in the northern scale to correct the alleged relative overstatement of the cost for the northern hauls. We have declined to recognize this adjustment as valid in our discussion of the cost evidence. It will be noted that the factors in columns 1 and 3 become equal at 400 miles but that the 5-percent reduction keeps the column 2 northern factors below the column 1 southern factors throughout the proposal. Such computations are to the advantage of the southern lines who have the longer average hauls. On the average hauls of 522 short-line miles South and 372 North the southern proposal would produce divisions of 58 percent South and 42 percent North. Such proposal obviously would be unfair to the northern lines on a cost of service basis as shown in our restatement of costs.

Construction of the divisional scales.—The examiners recommended the prescription of the factor scale we prescribed in the first 1953 report, except that the northern scale should be increased uniformly by 10 percent. They refused to change the construction of the scales on the ground that the Commission in the prior phase of this case considered the southern lines' contention as to the unsoundness of the prescribed scale and declined to modify the scale in the second 1953 report, 289 I.C.C. 4.

37 On brief and again upon exceptions, the southern lines urge that the construction of the existing scale operates unfairly upon them since they have the longer average hauls. They contend that the scale contains certain defects: (1) an unexplained and excessive allowance for short hauls; (2) the progression of the scale unlawfully depresses the revenues of the long-haul carriers; (3) the

value of each 50-mile block reflects services not performed because of the application of the scale to the upper limit of the mileage blocks; and (4) the value of the initial mileage block is excessive to the extent of 37 integers.

The new evidence adduced upon further hearing demonstrates that the foregoing contentions of the southern lines have merit, and we so find. Under the circumstances, and in light of our subsequent conclusion to be guided by the relative costs in our general determination, we have accordingly revised the general divisional factors to reflect warranted adjustments of record. The resulting scales, set forth in columns 1, 2, and 6 of Appendix C, are constructed from factors based on the fully distributed costs and give due and adequate consideration to terminal, way train, through train, and interchange costs, as incurred by the respective lengths of haul, and the factor for each mileage block has been computed at the midpoint, or median, for each block. We have utilized 50-mile blocks as in the past and as again urged by both groups. The basis of these scales is set forth as follows:

	Column 1 Official territory	*Column 2 Southern region*	*Column 6 Official territory*
Terminal and border interchange (mills per hundredweight)	64.17	44.08	——
Interchange for bridge traffic (mills per hundredweight)	——	——	17.07
Way train (mills per hundredweight-mile)	0.78905	0.67720	——
Way train miles	11	27	——
Through train (mills per hundredweight-mile)	0.63584	0.57756	0.63584

The scales are computed in the following manner using the 201-250 mileage block and column 1 as an example.

Terminal		64.17
Way train	0.78905 x 11 miles	8.68
Through train	0.63584 x 214.5 miles	136.39
Midpoint	225.5 miles	209.24
250 mileage block factor on appendix C, column 1		209

38 *The 15-percent minimum.*—The examiners recommended that the 15-percent minimum be retained under the divisional scales suggested by them. On exceptions the southern lines contend that if a proper divisional scale is used to reflect the services performed in handling the traffic at issue, full credit for terminal service, way train service and through train service (including interchange services) is reflected in the scale itself and there is no need for a minimum division. We agree with the southern lines in this respect. The prorating factors which we prescribe herein give full credit for terminal costs, thus appropriately protecting the very-short-haul carriers which, for the most part, perform principally originating or terminating service. Unlike, the existing scale which is weighed in favor of the very short haul, the scale prescribed herein, reflecting as it does the cost and service involved, gives each type of haul its proper share, and, therefore, no special protection for short hauls is warranted. In any event, the aggregate amount of traffic which would not be accorded a division of at least 15 percent of the through revenue appears to be inconsequential.

Divisions of the Norfolk Southern and Certain Other Lines

In the first 1953 report, 287 I.C.C. at page 544, portions of the 1939 report were quoted to explain why in that earlier proceeding the divisions of the Norfolk Southern Railway Company, except on peaches, were not made subject to the prescribed basis in 1939. Principally, reference was made

to the loss occasioned by such basis and to the resulting increase in the financial burden of this railroad.

This line's condition was found considerably improved in the 1953 phase of this case. The carrier then asked for some small relief through increased divisions, in which request it was joined by the Atlantic and East Carolina Railway Company and the Beaufort and Morehead Railroad Company. After consideration of the evidence concerning these carriers, the Commission was unable to find that a special basis of divisions for them would be justified. One of the considerations which led to this conclusion was the improved financial condition of the Norfolk Southern, particularly when compared with rates of return of the northern lines generally and those of the Pennsylvania in particular, with which line it was presumed that the greater portion of traffic through Norfolk was interchanged.

Thereupon, these three respondents filed sepa-
38 rate petitions seeking reconsideration. It was observed upon reargument (289 I.C.C. 4, 8) that the basis prescribed in the original 1953 report would cause these carriers to incur a proportionately greater reduction in revenue than the southern lines as a whole.

It was there stated:

> Upon further consideration we are in doubt whether the present record contains all the facts which should be currently considered in establishing a proper basis of divisions of joint rates between official territory and points on these lines.

Accordingly, the case was reopened for further hearing and the order as to these respondents was postponed pending the further hearing which was had in this reopened phase. Of the three carriers only the Norfolk Southern introduced evidence. No exception was taken to the examiners' conclusion that the divisions of the Atlantic & East

Carolina and the Beaufort & Morehead should be subject to the general basis prescribed. We affirm that conclusion.

The situation with respect to the Norfolk Southern requires separate detailed consideration. This line has in the past been classed as a weak line, having been awarded arbitraries in various instances. See *Southern Class Rate Investigation*, 100 I.C.C. 513, 128 I.C.C. 567. As noted in the first 1953 report, its condition had improved in years recent to that decision. Its main line extends from Norfolk, in a southwesterly direction, to Charlotte, N. C., 379 miles, with 210 miles of branch lines; 95 percent of its local mileage is in North Carolina, the remainder in Virginia. Its annual constructive year, later described, system freight revenues were $9,712,747, 34 percent, or $3,300,660 of which is involved here. For purpose of this case, the respondent has divided its traffic into three categories:

(1) Traffic in which the Norfolk Southern participates as an intermediate carrier moving between points in the South and points in official territory. The divisions on this overhead traffic are subject to the 1953 prescribed scales. During the constructive year revenue accruing to the Norfolk Southern in this category amounted to $879,069. No special basis of divisions on this traffic is requested, except that if a change is made in favor of the northern lines we are requested that this line's revenues as a whole not be diminished. Under the general basis of divisions prescribed in finding 2 herein we estimate that this revenue would be reduced by the 2.908-percent figure later indicated, or only $25,563. Revenue accruing here to the carrier is a subdivisional question and will not be made subject to a special basis.

(2) Traffic originating or terminating on the Atlantic & East Carolina and the Beaufort & Morehead railroads to and from points in official territory moving over the Norfolk Southern as an overhead or intermediate carrier. During the constructive year this category embraced the movement

of 1,655 cars, interchanged at Norfolk, only 60 cars of which were handled by the Beaufort & Morehead. It is estimated that Norfolk Southern's portion of the revenues would have been about $32,000 less annually if the 1953 prescribed basis had been applicable. The general basis of divisions in finding 2 herein would reduce the revenue by an estimated $47,079. All of the traffic in this category must be handled between New Bern, and Morehead City, N. C., or to and from points between Goldsboro, N. C., and New Bern by the Southern Railway. We find no circumstances which differentiate this traffic from that which originates or terminates on the Atlantic & East Carolina portion of the Southern Railway and is not interchanged with the Norfolk Southern. Revenue accruing to the latter in this category is again a matter of subdivisions and should not be made subject to a special basis.

(3) The third category, characterized as the most important, embraces that traffic which originates and terminates on the line of the Norfolk Southern and moves to or from points on lines of the northern railroads in official territory.

At page 545 of the first 1953 report it was stated:

> The divisions of rates to and from the Norfolk Southern are in an unsatisfactory state. To a large extent they are based on rate prorates running back for many years, as to which there is disagreement. The settlements of revenue apparently are determined by the line which collects the charges. It does not appear that the interested carriers have made any effort to adjust their differences, as we suggested in our 1939 report.

In this reopened phase the record shows that the divisional situation has not changed materially since the 1953 reports. Substantial evidence was adduced by the Norfolk Southern designed to support a finding that a definite

modernized basis of divisions be prescribed. As noted, however, it does not request an increase in its involved divisions, but asks only that the level of its revenue from this interterritorial traffic be preserved.

41 For the purpose of showing the characteristics of this category of traffic, this respondent submitted a traffic study covering all shipments of general traffic originated or terminated by it in the 2 months of November 1958 and March 1959, expanded to an annual basis by multiplying by six, and included separately all shipments of northbound fruits and vegetables for the year 1959. The general study, as expanded, covers what is referred to herein as the constructive year. The interterritorial traffic originated and terminated on the Norfolk Southern accounted for 15.1 percent of its total carloads, 12.6 percent of its total tonnage, and 23.4 percent of its total revenues, thus indicating that traffic in this category is relatively important to it. This general traffic study covers 17,292 cars, 638,394 tons, and total revenue of $5,588,844, of which the Norfolk Southern received $2,271,984 (including $10,284 in arbitraries) or almost 40 percent. The northern lines received about $3 million, almost 54 percent. In addition, there were 432 cars, 8,501 tons, of fruit and vegetables moved in 1959, all of which moved northbound via Norfolk; of the total fruit and vegetable revenue, $130,427, the Norfolk Southern also received about 40 percent. About 54.7 percent of the total cars in the traffic study were northbound, accounting for 50.8 percent of the total revenue. Southbound traffic generally consisted of higher rated commodities. By far the most important gateway on the total traffic was Norfolk through which moved 13,488 cars, 76.1 percent of the total. Second was Richmond, 1,590 cars, and in third place was Lynchburg, Va., 1,422 cars, other gateways sharing in the remaining traffic. Of the total 13,488-car traffic through the Norfolk gateway, the southern lines received about 43.4 percent of the total revenue or

$1,987,902. This latter figure excludes arbitraries of $7,488 accruing to the Norfolk Southern, but includes revenue of $1,326 for southern lines other than the Norfolk Southern, thus leaving for the latter revenues amounting to $1,986,576. However, on the 4,236 cars this respondent originated and terminated through other gateways, the southern lines received about 57.34 percent of the total revenue or $647,034. This latter figure again excludes arbitraries of $2,379 accruing to the Norfolk Southern but includes revenues of $320,052, or almost half, for southern lines other than the Norfolk Southern, the latter carrier thus receiving $326,982, or only slightly more than half of the total. Generally, intermediate southern lines participate in the movements via gateways other than Norfolk and, therefore, the situation presents a question of subdivisions.

42 The study indicates that if this traffic (including fruits and vegetables) during the constructive year had been subject to the 1953 prescribed basis, the revenue accruing to the Norfolk Southern would have been $450,362 less than that "as settled." Our analysis of the record indicates that the revenue accruing to the Norfolk Southern from this traffic, if it had been determined on the general basis provided in finding 2 herein, would have been $1,517,-242, or $796,316 less than that "as settled." As thus computed, the reduction on traffic through the Norfolk gateway would have amounted to $751,548 as contrasted to only $44,768 less than the revenue as settled via the other gateways. The line's net railway operating income in 1958 amounted to $267,700, and in 1959, $434,000. It can readily be seen that substantial deficits would have occurred in connection with the loss of revenue on originating and terminating traffic especially via the Norfolk gateway. The evidence demonstrates that the line is in pressing need of sufficient revenues to improve its physical plant and provide additional rolling equipment. It has paid no dividends since 1957.

Based on short-line ton-mile distances, the weighted average haul on all originated or terminated traffic during the constructive year was 162 miles south and 365 north via all gateways. On traffic moved only through Norfolk (13,488 cars) the averages were 136.6 miles south and 431.3 miles north. On the movement of the 432 cars of fruits and vegetables the averages were 55.2 miles south and 704.2 miles north which tended to reduce Norfolk Southern's average haul shown in the overall figures.

As stated, 76.1 percent of the cars in the traffic test were interchanged at Norfolk. This accounted for 85.9 percent of its total standard line revenue. At Norfolk it interchanges with the Chesapeake & Ohio, Norfolk & Western,[8] and the Pennsylvania. Various statistics of record show that the Pocahontas lines (C. & O. and N. & W.) participate in the traffic to a greater extent than the Pennsylvania. During the constructive year the 13,488 cars were interchanged at Norfolk as follows:

43

	Cars	*Percent*
Chesapeake & Ohio	3,412	25.30
Norfolk & Western	6,503	48.21
Total Pocahontas lines	9,915	73.51
Pennsylvania	3,573	26.49
Total	13,488	100.00

Of the cars shown above, 5,281 originated or terminated locally on the lines of the Chesapeake & Ohio and Norfolk & Western, and the remainder on the Pennsylvania. On a revenue basis the Pocahontas lines received 52.71 percent of the total (C. & O. 17.70 percent, N. & W. 34.39 percent, R.F. & P. 0.62 percent), the Pennsylvania 24.75 percent,

8. Data herein with reference to the Norfolk & Western, where applicable, include the Virginian Railway. These railroads merged December 1, 1959.

and all other northern lines 22.54 percent. The traffic moved by the Pennsylvania involves a marine service transfer across Chesapeake Bay at an expense of $35 per car.

Rates of return for the southern region and the eastern district plus the Pocahontas region, 1952 to 1959, are shown earlier in this report. A comparison of average returns 1946-50 of the latter with the Norfolk Southern and the Pennsylvania are shown at page 546 of the first 1953 report. Rates of return, 1952 to 1959, of the eastern district (excluding the Pocahontas region), the Norfolk Southern, and the three connecting lines at Norfolk based on net investment are shown below:

Percent return

Year	*Eastern district excluding Pocahontas region*	*Norfolk Southern*	*Chesapeake & Ohio*	*Norfolk & Western*	*Pennsylvania*
1952	3.43	2.33	6.65	5.43	2.98
1953	3.68	3.39	6.90	5.11	2.98
1954	2.48	1.88	6.16	4.76	1.96
1955	3.64	2.81	7.93	6.94	2.87
1956	3.33	2.81	8.20	7.19	2.76
1957	2.43	2.47	7.88	7.12	1.80
1958	1.13	1.01	6.68	6.63	0.49
1959	1.43	1.50	5.82	7.56	1.26

The northern lines assert that the foregoing comparisons of the eastern district, the Norfolk Southern, and the Pennsylvania are persuasive of the propriety, so far as primary divisions are concerned, of treating the Norfolk Southern in the same manner as other southern lines, leaving it to the respective groups to make any necessary special
44 provisions for the Norfolk Southern through the medium of subdivisional arrangements.

The Norfolk Southern urges that it would be absurd to diminish its revenue when the major beneficiaries would be the Pocahontas lines whose rates of return are rela-

tively high. It proposes that on traffic originated or terminated by it, interchanged at Norfolk, its prorating factors be made 149 percent of the factors presently prescribed for the northern lines, and on traffic moving through other gateways, 125 percent thereof.

The examiners recommended that the divisions on traffic originating or terminating on the Norfolk Southern be determined by the use of the equal-factor basis prescribed for general use on North-South traffic in the first 1953 report. This respondent takes exception to the examiners' report on the principal grounds that the recommended basis would place it in serious financial straits and would be confiscatory. It is supported on oral argument and exceptions by the southern interveners, including the North Carolina Utilities Commission which represents the interests of the State in which the principal operations of this respondent occur.

Respondent originates and terminates traffic of significant importance to itself, other carriers, and the shipping public. Despite its somewhat improved present day status of which we are officially aware, the record demonstrates that it can ill afford the loss of the involved revenue accruing especially on such traffic via the Norfolk gateway. It is apparent that if the Noroflk Southern's divisions on this latter traffic were determined on the general basis prescribed in finding 2 herein, it would be consigned to a deficit position so serious as to impair the rendering of adequate and continuous service to the public. We so find. Moreover, the southern lines' study excluded Norfolk Southern traffic from its scope. It is clear from the record, therefore, that the basis of divisions prescribed in finding 2 herein, derived from the southern study, would have an unjust and unwarranted impact on the Norfolk Southern to a degree not permitted under the *Orient* and *Western Trunklines* holdings. Our finding 4 herein will have the result of retaining for the Norfolk Southern a percentage

of revenue substantially the same as the present 43.4 percent received by it on the traffic through the Norfolk gateway. This will be accomplished by an increase of 108 percent in the factors of column 2 in appendix C. We have, therefore, divided the revenue on shipments originating on the Norfolk Southern moving via the Norfolk gateway on the basis of the cost progression, giving this respondent approximately the same total revenue it now enjoys on the traffic by means of the construction of column 5 in appendix C. We find that the aforementioned scale will result in just and reasonable divisions in the special situation of record with respect to the Norfolk Southern.[9] As noted, this respondent would be deprived of some revenue to the extent that the general basis prescribed would apply to other movements in which it participates with other southern lines. However, no justification for special treatment was presented and relief would involve principally a question of subdivisions, a matter not at issue here. On the whole, the Norfolk Southern, as compared with the other southern lines, would remain in the same relative position as now obtains. All other traffic of the Norfolk Southern will be subject to the general basis of divisions herein prescribed between the northern and southern lines.

45

One additional matter requires consideration as to the Norfolk Southern. Under a permissive order of the Commission in *Pooling of Refrigeration Earnings*, 258 I.C.C. 24, effective January 1, 1942, the proprietary lines of the Fruit Growers Express Company were allowed to enter into an arrangement whereby the net loss or gain realized in furnishing protective service could be pooled and at the close of the year such net loss or gain be distributed be-

9. As a matter of practicable scale construction, other southern lines will be subject to this same scale on Norfolk gateway traffic originating or terminating on the Norfolk Southern. However, their participation therein is shown to be relatively nil. Thus, any revenues accruing to them thereunder would be negligible.

tween the participating proprietary lines on the basis of loaded car miles handled by such lines. Members of the pooling arrangement were the major carriers in the South and certain eastern carriers that terminated perishable traffic. The Norfolk Southern joined about May 1, 1945. However, on and since April 1, 1959, several of the principal official territory lines, including the Pennsylvania, Chesapeake & Ohio, Norfolk & Western, and Baltimore & Ohio, have withdrawn, so that now only the Richmond, Fredericksburg & Potomac is still a member. As a result, the Norfolk Southern estimates it is losing an average of $49 on each car of originated fruits and vegetables given protective service. It requests that the prorating factor prescribed for it on its originated and terminated traffic interchanged at Norfolk be an additional 4 percentage points higher as a temporary measure until the pooling situation is adjusted. It contends that the Commission clearly recognized the pooling arrangement as an equitable solution of the divisional problem and that the withdrawal of the northern lines from that arrangement places an unjust divisional burden on it.

46

To give effect to the Norfolk Southern's position in this regard and on the limited evidence adduced, as pertinent, would penalize the carriers for withdrawing, despite the permissive aspect of the order. In essence, it would appear that the Norfolk Southern challenges the reasonableness of the level of the charges for protective refrigeration service. That issue is beyond the scope of the instant proceeding. In sum, the foregoing relief sought by the Norfolk Southern is not warranted.

At the time of the hearings herein, points on the line of The Atlantic and Danville Railway Company were generally understood to be in southern territory. As stated earlier, the divisions of joint interterritorial rates between points on the lines of this carrier west of Suffolk, Va., and points on the lines of respondents in official territory are

in issue in this reopened phase. The examiners recommended that the divisions from and to such points be those prescribed for other southern lines generally, to which no exception was filed. However, this carrier has been acquired by, and is now known as, the Norfolk, Franklin and Danville Railway Company, which in turn is under the control of the Norfolk & Western. See *Norfolk & W. Ry. Co.—Control—Norfolk. F. & D. Ry. Co.*, 320 I.C.C. 407. It is now classified in the Pocahontas region for statistical purposes. Our prior definition of northern and southern lines will be amended so as to give proper effect to the examiners' conclusion which we affirm.

The Georgia & Florida Railroad (Alfred W. Jones, receiver) made a presentation in its own behalf. We affirm the examiners' conclusion, to which no exception was taken, that this carrier is not entitled to a special basis of divisions. It has since been purchased by the Georgia & Florida Railway Company which in turn is under control of three subsidiaries of the Southern Railway System. See *Georgia & F. Ry. Co.—Acquisition—Georgia & F.R.*, 317 I.C.C. 745.

The New Haven has pointed to a general need of additional revenues in order to provide funds for maintenance, for capital improvements, and to make some return to its stockholders. We can find no basis here for according it any greater relief than that set forth in the general
47 basis of divisions prescribed hereinafter. Unlike the Norfolk Southern, it participates only to a limited extent in the traffic at issue.

General Discussion and Conclusions

Section 15(6) of the act provides in part as follows:

> Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates * * * applicable to the transportation of * * * property, are or will be unjust,

> unreasonable, inequitable, or unduly preferential or prejudicial as between carriers parties thereto * * * the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers * * *.

In its determination of lawful divisions, the Commission is directed by the second sentence of section 15(6) as follows:

> In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

In commenting upon the importance to be given the various factors, the district court in *Boston & Maine R. v. United States,* 208 F. Supp. 661 (D. Mass. 1962), *affirmed per curiam,* 371 U.S. 26, stated at page 675:

> "'Due consideration' is not the equivalent of 'primary consideration.' The importance to be given any of the factors enumerated in the statute must necessarily depend upon the case under consideration. The evaluation of the importance of the various factors in any given case is peculiarly the function of the Commission.

In one of the first decisions involving these provisions, *New England Divisions,* 66 I.C.C. 196, the Commission

stated at page 199 "that the relative amount and cost under economical and efficient management of the service
48 rendered is a prime factor in determining the fair and equitable share of joint revenue which each carrier shall receive." In the 1939 report the cost element was given weight upon a showing that from 1932 to 1936 the cost per revenue ton-mile in the South was about 16 percent higher than that in the North. At page 525 of the first 1953 report, as previously referred to, it was stated that the record then showed that "for more than a decade the southern railroads have not labored under a disadvantage of operating costs generally higher than those of the northern lines."

As stated earlier, both groups rely heavily upon relative costs of service as a determining factor in this reopened phase. The northern lines say:

> It is beyond dispute that the power of the Commission to prescribe divisions of joint rates rests upon Section 15(6) of the Act as that provision has been construed by the Commission itself and by the Courts. Those interpretations make it abundantly clear that relative service costs are a primary consideration and that the Commission must, in addition, weigh the relative financial needs of the carriers involved in the light of the public interest. It is the position of Eastern lines that the Commission should, first, undertake to fairly assess the relative service cost levels of the two groups of carriers, parties to the involved rates, and should thereafter adjust its determination made upon the basis of such relative costs to reflect any greater financial need on the part of one of the groups.

The southern lines' emphasis on cost-of-service basis is reflected in their proposed integer scales which, as indicated heretofore, are directly related to the showing of their cost study.

Our restatement of the costs, which are reasonably accurate and reliable for purposes of determining the relative contribution by the groups on a cost-of-service basis, shows that the cost level in 1956, the year both groups used in the final cost analysis, is somewhat higher in the North than in the South for like services. A consideration of all factors indicates that this situation will most likely continue in the immediate future.

Both groups also rely upon revenue needs in claiming that they should have a greater share of the joint revenue than the present divisions accord them. The northern lines take exception to the examiners' recommendation which would increase the northern divisions, on the ground that the proposed increase is not large enough. On the other hand, the southern lines contend that the examiners erred in failing to find that the needs of the southern railroads
49 for additional revenues are greater than those of the railroads in the North.

In every divisions case evidence relating to revenue need is material because section 15(6) requires that "due consideration" be given, "among other things" to "the amount of revenues required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation." We are thereby authorized "to take into account and give due weight to revenues from all transportation service, the operating expenses and taxes chargeable to the same and the amounts available as compensation for the use of all carrier property," as well as "the revenues, expenses, taxes and returns attributable to the service covered by the divisions under consideration." *Baltimore & O. R. Co. v. United States,* 298 U.S. 349, 360, 370 (1936). We are free to give such evidence the weight which the particular circumstances appear to justify.

In our determination herein we have considered evidence relating to the cost and other factors concerning the

public interest in maintaining all essential parts of the transportation system. Neither the history of these divisions, the general economic trends, nor any other factor presented here offers a concrete basis on which to find that either group is entitled to a share of the joint rates larger than that accruing under the divisions hereinafter prescribed on the basis of relative costs. In essence, the basic position of the northern lines is that their revenue needs are greater since the southern lines' average rates of return are somewhat higher. However, our prescription of divisions based on relative costs includes allowances for overhead and return, and in our judgment reflects a due proportion of the burden of maintaining the financial integrity and credit of the carriers involved. *Cf. New England Divisions,* 66 I.C.C. 196, 199. Accordingly, we see no justification at this time for adding any special increment favoring one group of carriers over the other. We find that no affirmative reasons appear in this record which would warrant any adjustment of the divisions in question over and above the relative costs of service, either on the grounds of greater revenue needs or otherwise.

The question of prescribing equitable divisions involves the making of practical judgments rather than the solving of a problem with mathematical certainty. See *Boston & Maine R. v. United States, supra.* As we have indicated, a careful evaluation of the factors, other than costs, which we must consider under section 15(6) does not disclose that they require that one group be accorded relatively higher divisions of the joint rates than the other; in other words, there is no convincing evidence of record favoring one group over the other. However, weighing the cost evidence of record in the same balance and similarly considering it, without particular solicitude, we are of the opinion and find that it affords a reasonable basis for the exercise of a practical judgment. Stated in another manner, everything else being substantially equal, the relative costs of the parties reflecting their respective opera-

tions as to this traffic can properly serve here as a guide for the determination of just, reasonable, and equitable divisions. *Cf. Louisville & N. R. Co. v. Southern Ry. Co.*, 319 I.C.C. 639, at pages 657-658.

We have heretofore noted that the revenues in 1956 for the northern lines from the traffic at issue were but 6 percent of their total freight revenues, while for the southern lines the respective percentage was 21.4. In that year the northern lines received 44.64 percent of the revenue while incurring 46.35318 percent of the fully distributed costs. It is clear that an adjustment in the divisions is required to compensate the respective groups according to their expenditures in the joint effort of handling this interterritorial traffic. To the extent that the present divisions do not meet this test, they are unjust, unreasonable, and inequitable. The scales which we have prescribed in columns 1, 2, and 6 of appendix C herein are based on the fully distributed costs and divide the revenue in the same proportion to those costs. Based on the 1956 traffic study this will increase the revenue divisions of the northern lines with a corresponding decrease in those of the southern lines as follows:

Item	*North*	*South*	*Total*
Revenue as settled [1]	$221,370,940	$273,350,121	$494,721,061
Percentage of costs	46.35318	53.64682	100.00000
Proposed revenue [1] .... division	$229,318,944	$265,402,117	$494,721,061
Difference	$7,948,004	$7,948,004	——

1. Omits arbitraries of $59,401 in the North and $1,306,304 in the South.

The foregoing reflects a 3.590-percent increase in revenue, as settled in the North, and a 2.908-percent decrease in the South. In our opinion, the results achieved through the application of the divisional mileage scales here pre-
51 scribed will for the future be just, reasonable, and equitable, and we so find. However, as in *Louisville*

& N. R. Co. v. Southern Ry. Co., 319 I.C.C. 639, 661, the parties should be permitted to negotiate and agree upon any other modified scales, devised on the same basis, but with different mileage blocks and factors or pursuant to any other method they may deem appropriate. In the event that they fail to reach agreement prior to the effective date of the order herein, the scales set forth in appendix C hereto are prescribed to apply thereafter. The conclusions and subsidiary findings hereinbefore made are reflected in our ultimate findings.

ULTIMATE FINDINGS

Upon further hearing, we find:

1. That the present primary divisions of joint all-rail class and commodity rates (except those on traffic listed in appendix A) between official and southern territories are unjust, unreasonable, and inequitable.

2. That, except as hereinafter provided, just, reasonable, and equitable primary divisions of the rates referred to in finding 1 (including aggregate of intermediate rates which automatically displace single-factor joint rates), in which northern and southern lines [10] participate, should be determined by use of the prorating factors set forth in appendix C in computing percentages expressed as integers, the factor for the northern line or lines being that shown in column 1 for the short-line distance north of the dividing point and the factor for the southern line or lines being that shown in column 2 for the short-line distance south of the dividing point.

3. That just, reasonable, and equitable divisions of the joint combination rates on Canadian and northern Maine traffic to and from points in southern territory should be determined in the same manner as specified in finding 2, except that the factor for the northern line or lines should be that shown in column 6 of appendix C for the short-line

10. As defined in appendix C.

distance north of the dividing point and the factor for the southern line or lines should be that shown in column 2 of appendix C for the short-line distance south of the dividing point.

4. That just, reasonable, and equitable primary divisions of the rates on traffic originating or terminating on the lines of the Norfolk Southern Railway Company,
52 and moving to or from points in official territory, via Norfolk, should be determined by the use of the prorating factors set forth in appendix C in computing percentages expressed as integers, the factor for the northern line or lines being that shown in column 1 for the short-line distance north of the dividing point and the factor for the southern line or lines being that shown in column 5 for the short-line distance south of the dividing point. All other primary divisions of the Norfolk Southern shall be on the basis set forth in finding 2 herein.

5. That the evidence is not sufficient to support conclusions directed to the unreasonableness of the present divisions of the joint rates published between points on southern lines, on the one hand, and points on western lines in official territory, on the other hand, where a northern line does not participate in the movement north of the dividing point, and we find the present divisions not shown to be unjust, unreasonable, inequitable, or unduly preferential or prejudicial.

We affirm our prior finding (287 I.C.C. 547) that just, reasonable, and equitable divisions of joint proportional or reshipping rates on grain and grain products from East St. Louis, Louisville, and Cincinnati to points in southern territory should be determined in the same manner as specified in finding 2, except that the factor for the northern line or lines should be that shown in column 4 of appendix C for the short-line distance north of the dividing point and the factor for the southern line or lines should be that

shown in column 3 of appendix C for the short-line distance south of the dividing point.

We affirm our prior finding (289 I.C.C. 4, 8) that the dividing points to and from which the primary divisions shall apply are the present dividing points.

The prescribed primary divisions shall not be subject to a specific minimum. In disposing of fractions of 1 percent the odd 1 percent should be added to the percentage which contains the larger decimal, or if the percentages contain equal decimals 1 percent should be added to the smaller percentage.

Before the divisions herein prescribed are applied, differentials or arbitraries which are included in the joint rates so as to cause them to exceed standard rates, for hauls in either official or southern territories, whether for short or weak lines or otherwise, shall be deducted before prorating and added to the share of the carrier or carriers in the territory in which the differentials apply, pro-
53 vided, however, that in respect of rates on citrus fruit from Florida to official territory which include an arbitrary one percentage point shall be deducted from the northern division and added to the southern division in lieu of the specific apportionment of the arbitrary.

Our findings are without prejudice to the substitution of modified scales agreed upon by the parties in accordance with the discussion above.

An appropriate order will be entered.

COMMISSIONER MURPHY, dissenting in part:

In prescribing divisions we are required to divide earnings under joint rates according to what is fair and reasonable as between the parties. One of the main criteria used to make such a determination is the relative amount and cost of service performed by each of the several

carriers participating in the movement of the *specific* traffic involved from which this revenue is derived. The report of the majority purports to use as a basis for adjusting divisions the relative costs of service of the two groups of carriers, but in many instances territorial average costs are used which do not fairly measure the relative costs of handling the Official-Southern traffic here at issue. The record shows that the revenue obtained by the territory railroads from the traffic at issue constitutes only 6 percent of their total freight revenues. However, the average statistics used in arriving at the costs utilized by the majority in the report represent 100 percent of the traffic of the official lines. As a result, many of the cost figures have little or no relation to the movement of the traffic involved.

Although a number of adjustments in the Rail Form A statistics were made in the report, other necessary and important adjustments which would truly reflect the cost of moving the traffic involved were rejected or ignored. Consequently, costs for the service performed by the official lines in handling the traffic at issue are overstated. In *Louisville & N. R. Co. v. Akron, C. & Y. R. Co.*, 309 I.C.C. 491, 509, also known as the *Border Points Division* case, the Commission rejected the use of unadjusted Rail Form A costs, stating: "* * * the only comparable cost data for the complainants and the defendants are on the basis of territorial or systemwide averages, which are not determinative of the costs of these particular movements." The Commission therein did accept, however, specific costs supplied by complainants and complainants' adjust-
54 ments in territorywide average costs submitted by defendants. This finding by the Commission was sustained on judicial review, *Boston & Maine R. v. United States*, 208 F. Supp. 661 (D. Mass. 1962), *affirmed per curiam*, 371 U.S. 26.

Included in the cost computations for the official lines are suburban service deficits which are peculiar only to

the large metropolitan areas found in official territory. These deficits have no relation to intercity passenger deficits which normally are considered as part of the cost of providing freight services in that such passenger deficits are for the most part attributable to the apportioned costs of common facilities which must be incurred in any event to provide freight service. Almost all the expenses incurred in providing suburban passenger service have nothing to do with the costs of handling the Official-Southern traffic at issue in this proceeding. This service is provided over lines especially constructed and maintained for that sole purpose with equipment and facilities that have no other use whatever. It is unreasonable to require the southern lines and their shippers to defray a part of the costs of suburban passenger service in official territory cities so that the residents of the suburbs of those cities can travel at fares that do not even cover costs. This burden should be borne by the commuters who benefit thereby and the communities involved.

The higher than average empty return ratios used for cars moving over the official lines is another instance where true costs have not been used. The official lines handle approximately 800,000 carloads of automobile parts annually which originate in the Detroit, Mich., area and are destined to assembly plants in various parts of the country, including New Jersey, California, and Georgia. Many of these cars are fitted with special devices to protect the automobile parts in transit. Because these cars carrying parts contain special devices and are assigned to particular plants manufacturing such parts in official territory, they normally experience an empty return movement which is, for all practical purposes, 100 percent. No adjustment is made in the cost data to cover the higher empty return costs of this type of equipment. Territorial average boxcar empty return ratios, as used in the report, overstate the costs of the official railroads when applied to Official-Southern traffic.

The improper counting of a car interchanged instead of terminated by the official lines affects the weighting of that car in computing switching costs. The official
55 lines report a large volume of coal and ore terminated at port dumping facilities for loading onto boats as cars interchanged, while the southern lines report a large volume of phosphate rock hauled to ports for loading onto boats as cars terminated. These cars receive analogous services and should be treated as such. In both these instances the lading from the car is removed and the empty car is returned to the delivering carriers. The erroneous counting of cars terminated as cars interchanged on the official lines produces higher unit costs for official territory than for southern territory, both for origin and destination switching and for interchange switching.

If the above valid adjustments were to be made in the restated costs the difference between the relative costs of service of both parties would not be as great. In my judgment the amount of increase in divisions awarded the official lines by the majority is unwarranted.

Appendix A

Divisions of joint interterritorial rates prescribed herein do not apply on the following traffic:

1. Coal and coke made from coal, by common consent of the parties.

2. Trailer-on-flatcar traffic moving entirely over the lines of the A.C.L., B. & O., B. & M., F.E.C., N.Y.C., N.Y.N.H.&H., P.R.R., Reading, R.F. & P., and S.A.L., by stipulation at hearing.

3. Trailer-on-flatcar traffic via Potomac Yard, Va., from and to points on the Southern Railway (including its system lines as specified in the stipulation) and points on B. & O., B. & M., C.R.R.N.J., D. & H., L.I.R.R., N.Y.C.,

N.Y.N.H.&H., P.R.R., and Reading, by stipulation dated November 13, 1961.

4. Border point traffic embraced in docket No. 32055 (309 I.C.C. 491) by stipulation.

Appendix B

Southern lines' specific cost adjustments

a. Way and through train separation.—The Form A procedure provides for costing out traffic at either average train costs or a combination of way train and through train costs. Although the northern lines used average train costs in their study on the theory that it was adequate for overall territorial cost comparisons, they have no objection to the more refined procedure of using way and through train costs. This has the effect of giving slightly lower costs at the longer distances and higher costs at the shorter distances, and reduces the proportion of costs of the southern lines by 0.13 percentage point. We approve this adjustment.

b. Platform costs.—The southern lines excluded platform costs from their study of the costs of originating and terminating official-southern traffic. This brought about an increase of their proportion of the costs by 0.28 percentage point or in revenues about $1,389,000. This exclusion was based upon the conclusion that whenever a separate tariff charge was made for carrier loading or unloading, platform costs should be excluded. They examined 19 cars out of a 130,353-car sample of the involved traffic (967,554 cars), and contend that for all practical purposes none of the involved traffic received lighterage or any other service which would include platform handling as a part of the service under the line-haul rates being divided.

56

The northern lines took the same 19-car sample and showed that 11 originated on the eastern lines, 8 of which

were from Manhattan and 2 from Brooklyn, all 10 of which required either float or lighterage service and platform service. One car originated in New Jersey which was not involved in the issue of platform service. Of the eight cars destined to eastern carriers in the New York area, only two were actually delivered to Manhattan, one to Long Island City, and one to Brooklyn, the four likewise requiring harbor service. Three cars were destined and delivered to New Jersey points, and therefore did not require harbor service. The one remaining car was shown for diversion at Potomac Yard, but then no destination was shown, and there was no possibility of knowing what final service was required.

It is evident from the facts that platform service is incurred by some of the shipments of official-southern traffic. However, as noted, the southern lines excluded platform costs in each territory, contending that such costs are no longer part of the service covered by the line-haul rates but are covered by a separate charge collected and retained by the northern lines. The southern lines excluded their own platform costs in the interest of relative equality between the territories.

In prior years platform service was considered a part of the line-haul service covered by the through rate, and, accordingly, platform costs less the incidental revenues were correctly included in computing the cost for the line-haul service. Thereafter, however, the conditions at the unloading facilities changed. Whereas prior conditions necessitated that shippers be denied access to the cars for unloading at piers, the new conditions permitted shippers access to the cars. As a result, unloading was no longer a part of the line-haul service provided by the railroad but became the responsibility of the shippers, as it is at other destinations in all territories. The Commission took cognizance of these changed circumstances in *Increased Freight Rates, 1958,* 304 I.C.C. 289, 375, when it indicated:

The line-haul rates on this traffic are designed to cover only normal delivery and do not include compensation for the loading and unloading services, the line-haul rates on the perishable traffic being generally below out-of-pocket costs.

For the purpose of comparing relative territorial cost levels the inclusion of both the incidental revenue and the costs of platform service are correctly shown in Rail Form A; however, where the purpose is to measure the cost of services performed under the line-haul rates to be divided, it is correct to exclude platform service which is not within the scope of the rates. Our restatement reflects this view.

57 *c. Switching and terminal companies.*—An understanding of the switching charges at Chicago and St. Louis requires a consideration of Rail Form A procedures for switching and terminal companies. The Rail Form A procedures separate the costs for such companies as between the costs and services for intraterminal and other operations not chargeable to the origination or termination of cars for the account of class I roads (25 percent) and the costs and services which are so chargeable to class I roads (75 percent). The latter costs and services are then associated with class I line-haul railroads in whose statistics the cars originated or terminated are reported. This procedure is not questioned, but in dividing the switching and terminal company costs among groups of carriers the following complication arises.

The percentage separation of the (75 percent) costs of switching and terminal companies which are located on territorial borders is illustrated below:

	Eastern district	*Western district*	*Southern region*	*Total*
Chicago, Ill.	50	50	—	100
St. Louis, Mo., and East St. Louis, Ill.	50	50	—	100
New Orleans, La.	—	50	50	100
Louisville, Ky.	50	—	50	100

The southern lines consider the allocations at New Orleans and Louisville to be reasonable since carriers assigned to other territories do not reach those points. However, two southern region carriers reach Chicago and four reach St. Louis or East St. Louis. The southern lines maintain that since the reported statistics assign to the southern region carriers the cars switched for their accounts by the switching and terminal companies at those points, the portion of the switching and terminal companies' expenses which are associated with switching such cars must be allocated to the southern region carriers in order to determine the actual unit costs. To accomplish this end, the southern lines determined the proportion of the total transportation revenues of each switching and terminal company at the above-mentioned cities that was paid by the southern region carriers. They then assigned the relative proportion of switching and terminal company cost to the southern region.

The northern lines maintain a different viewpoint toward these switching points at the Chicago and St. Louis areas. They contend that Chicago is not now a primary breakpoint on the North-South traffic and that East St. Louis is such a breakpoint only with respect to certain Mississippi Valley traffic. They believe that it is improper to take any portion of the expense of switching and terminal companies in the North and put it into the costs used to price out southern lines' services south of the primary divisional gateways.

Regardless of where the breakpoint for dividing revenues is located, the cost on each side ought to be properly computed and the so-called territorial costs are, in reality, those for groups of carriers operating principally in each territory. We are of the opinion that the southern lines are justified in making this adjustment of the switching and terminal company costs at the Chicago and St.
58 Louis areas; the involved cars are counted in the southern region, and, accordingly, the expenses asso-

ciated with them also should be included in that region. While revenue does not ordinarily afford a precise indication of costs, the southern lines' apportionment for the switching and terminal companies on the basis of total transportation revenue is an appropriate and practical method for estimating here the amount of a refinement justified in principle. This adjustment increased the southern lines' proportion of the costs of official-southern traffic by 0.16 percentage point or in revenues about $794,000.

d. Count of cars interchanged, originated, and terminated.—Rail Form A cost applications are based on the count of cars from the Freight Commodity Statistics which, briefly stated, provide that certain cars carrying shipments which are transferred between rail and water carriers, such as lake cargo coal, tidewater coal, and ex-lake ore, will be classed as cars interchanged and that certain other cars carrying shipments transferred between rail and water carriers will be classed as cars originated and terminated. This creates a situation where a car of coal transferred to a ship at an Atlantic port would be classified as interchanged if the shipment is destined to New England, and as terminated if the coal is destined to Europe. Further, coal in official territory going to Canada and transferred from rail to vessel at a Great Lakes port is interchanged, whereas phosphate transferred from rail to vessel at Tampa, Fla., is terminated.

The southern lines contend that for the purpose of determining relative costs incurred by northern and southern lines, it is necessary that cars receiving comparable service be counted in a consistent manner in both territories. The southern lines urge that all of these cars which receive such port service should be classed as originated or terminated because they all are said to receive similar switching service. That a larger proportion of these cars in the North than in the South was classified as interchanged is said to inflate both terminal and inter-

change unit costs more in the North than in the South to the southern lines' disadvantage. To correct this alleged inflation, they examined the information furnished periodically to the Commission for the purpose of reconciling its study of terminations reflected in its Carload Waybill Statistics publication with the Freight Commodity Statistics. They found that 1,803,499 cars in the North and 129,019 cars in the South should be changed from "interchanged" to "originated plus terminated." The number of cars originated and terminated was thereby increased 5.4 percent for eastern district, 8.7 percent for Pocahontas region, and 1.1 percent for the southern region. This had the effect of reducing the costs $2,003,871 in the North and $555,541 in the South, and of changing the South's proportion of total costs from 53.44 percent to 53.67 percent, an increase of 0.23 percentage point.

The northern lines contend that the switching characteristics of the port service between rail and vessel of this traffic are more akin to interchange than to terminal service, that interchange costs vary greatly, and that the information available is inadequate to correctly compute the adjustment. The switching characteristics of this traffic are described by the northern lines as follows:

> That the service at tidewider ports on coal, and the lake ports on coal and ore, is interchange rather than terminal is apparent from the facts with respect to these services. Taking lake cargo coal as an example, the coal trains go to the railroads' lake front
> 59 yards at the ports. Unlike cars which are to be terminated, the lake cargo coal cars are not then moved to various industries in transfer runs and then switched to effect delivery at the consignee's plant. Rather, they are moved to a dumping machine at the railroad's water front yards and there dumped into the lake vessel. It is obvious that this service is much more akin to a movement to an interchange track than to a transfer and switching movement to effect delivery

to a consignee. The fact that the car is not given over to the boat line along with the lading cannot, in itself, mean that the shipment is not interchanged. The interchange of an l.c.l. shipment between railroads is not accompanied by a delivery of the car which carried the shipment; but, nevertheless, it is an interchange. Also, the fact that the interchange is with a boat rather than with a railroad—that the movement is to a dumping machine rather than to an interchange track with another railroad—cannot detract from the essentials of the operation and their significance from a cost standpoint.

The northern lines contend that interchange costs vary greatly and that lake cargo coal, tidewater coal, and ex-lake ore are not in a class by themselves. They state:

> Of course, interchange service may involve high, low, or average expense, just as terminal service may involve high, low, or average expense. For example, the interchange of cars between railroads in New York Harbor necessitates the expense of floating service. So does the interchange of cars between the Pennsylvania and connecting lines at Norfolk. Another illustration of an expensive interchange service of cars is in the case of traffic which formerly moved between interior points in the East and interior points in the Southwest over the so-called break bulk water routes. This traffic even when moving under joint rates (like some of the lake cargo coal traffic) required transfer from car to vessel at the ports.

They also urge that the information furnished to the Commission for purposes of reconciling the waybill study with the Freight Commodity Statistics is inadequate for the purpose of computing the number of cars to be transferred from interchange service to terminal service and that a substantial portion had to be estimated.

There is a great variation from one point to another in the amount of both terminal switching and interchange switching due to the physical layout of the tracks, volume handled, and other causes. Rail Form A gives an equating factor of 1.0 to origin or destination switching and a factor of 0.5 to interchange switching which reflect the relative amount of switching. The northern lines have referred to the similarity of switching at lake ports to interchange switching. Also, because of the large volume of this traffic, it lends itself to multiple-car block switching which is less costly than terminal switching and would justify an equating factor less than one. The reconciliation between the waybill study and the Freight Commodity Statistics had to do only with terminations, and therefore the originations were estimates only. These included the large blocks of traffic received by boat, transferred to car, terminated on rail, and which were counted as interchanged at the port.

This traffic has been counted as interchange traffic for
60 many years. The rates on this traffic are different than the rates on traffic originated or terminated at the same ports. Evidence was introduced to show that the switching characteristics of the port service on this traffic are more akin to interchange than to terminal service. There is great variation from one point to another in the amount and cost of both interchange and terminal service. There is no evidence that the service performed on this traffic is comparable to the average service in originating or terminating traffic in official territory. All things considered, we are of the opinion that the estimate lacks sufficient probative force, that the contentions of northern lines have merit, and that a change in the classification of this traffic for costing purposes in this case is not justified. It has therefore not been included in our restatement of the costs.

e. Car costs.—In the transportation of official-southern traffic, 15 percent moves in refrigerator and tank cars, mainly mileage basis cars, and 85 percent in per diem basis cars. It is the car costs of the per diem cars which

are at issue. The southern respondents contend that the territorial differences in car costs are due to factors unrelated to the traffic in this case. To correct this situation, they urge that average car costs for the United States should be used in both territories. The territorial difference in car costs reflected in Form A for a boxcar with a 28.9-ton load moving 350 miles with one terminal is—

		Percent
Official territory	$16.20	132
Southern region	12.27	100
Difference	3.93 [1]	32

[1] Assuming equal empty return ratios.

The relative size of this difference may be judged by comparison with the total out-of-pocket cost of the same service in the southern region of about $85.

In urging United States average car costs, the southern lines list three reasons in explanation of the variation in car costs between territories, and contend that none of these reasons has any bearing on the relative costs incurred in handling official-southern traffic. As the first reason, they state that the territorial average car cost reflects the composite cost of the car fleet owned by each group of roads and there is a different car fleet in each territory very different from the consist of the cars handling official-southern traffic. It is stated that differences in the car costs produced by Rail Form A as between territories do not measure the differences in the cost of repairing boxcars but rather the difference in the composition of the car fleet. About 82 percent of the car-miles of study traffic (per diem cars) in each territory are handled in boxcars.

Information is adduced as to the percentages of ownership of each type of car in each territory and the percentage of car-miles made by each type of car. We view the per-

centages of ownership as more meaningful since the owning road bears the cost of repairs, depreciation, and return. As to boxcars, the proportion in the North is 36.9 percent and in the South it is 37.9 percent; this difference is too small to be significant. The major differences in ownership are that the North has 7.6 percent points more open hopper cars and the South has 7.0 percentage points more rack cars. These percentages may be said to equalize each other,
61 and, in any event, such cars are used only on a limited basis in the instant traffic movements.

Costs per day or per year for repairs, depreciation, and return are shown to be insignificant as between types of cars. However, utilization is the main differentiating factor in costs between individual types of cars.

The effect of the composition of the car fleet on costs developed in Rail Form A can be measured by its effect on car utilization, as follows:

		Percentage of ownership		*Miles per year of composite car*	
Type of car (1)	*Miles per year* (2)	*Official territory* (3)	*Southern region* (4)	*Official territory* (2) x (3) (5)	*Southern region* (2) x (4) (6)
		Percent	*Percent*		
Box	19,635	36.9	37.9	7,245	7,442
Flat, including rack	12,456	1.8	9.7	224	1,208
Stock	16,953	.7	.6	119	102
Gondola	9,503	17.5	15.2	1,663	1,444
Open hopper	11,827	40.4	32.8	4,778	3,879
Covered hopper	13,816	2.5	3.8	345	525
Other (average)	15,178	.2	0	30	0
		100.0	100.0	14,404	14,600

As indicated above, however, the effect of the composition of the car fleet in each territory, as reflected by the overall utilization, is only slight, 14,404 in official territory as against 14,600 in the South. Any explanation for the dif-

ference of 32 percent in the car costs between the two territories would lie elsewhere.

The second reason advanced by the southern lines on this point is that the territorial average car cost developed in Rail Form A is strongly affected by per diem debits or credits. This, they assert, has a distorting effect because the basis used in computing Rail Form A costs differs from that used in determining per diem rates. The third reason is that in determining the unit car costs by dividing the cost of cars owned by the car-miles operated, the numerator and the denominator do not represent the same cars in any given territory. These two reasons are related and will be discussed together. Under Rail Form A, the cost to the railroads of furnishing freight train cars includes the following items:

(a) owner costs (repairs, depreciation, and return on investment) for all cars owned, including both those serving on line and those serving off line, offset by per diem received for those cars serving off line;

(b) user costs (repairs and inspection) of all cars on line, both owned and foreign;

(c) per diem paid for foreign cars on line;

62 (d) repairs (responsibility of owner) to foreign cars offset by amounts billed; and

(e) overhead costs.

The sum of these costs is divided by the car-miles run on line by both foreign and domestic cars to give a cost per car-mile. Thus, the numerator and denominator are consistent; both represent cars serving on the railroad.

The repairs and maintenance represent actual payments for materials and wages; per diem is a cash payment; depreciation is a portion of money paid in the past to purchase cars and allocated to the present period; and even return on investment, a cost of capital, can be considered as analogous to interest payments on money borrowed to pur-

chase cars. Thus, all these items represent actual outlays of moneys and must be recovered by the railroads if they are to remain financially solvent. The determination and fixing of a rate of per diem which is fair as between all railroads and sections of the country is a difficult and complicated problem into which many considerations enter. However, after the rate is determined it becomes an actual disbursement settled in dollars and cents and properly a part of the costs for each road and territory in the year incurred.

The per diem collected by a road for the use of its cars by others should be used to offset its car costs incurred on the lines of the foreign carriers, for it is assumed that, allowing for exceptions in special situations, the per diem charge generally reimburses owning roads for expenditures in owning and maintaining cars in working order.

All of the items entering into the Rail Form A car costs represent actual expenses, and therefore, any difference in the car costs between the two territories, whether caused by per diem or other items, is not a discrepancy but is a reflection of the actual situation, and this difference (because it is actual) should be considered in the comparison of the relative costs of the two territories.

The southern lines contend that the higher average car cost in the North is a reflection of the average car which is largely hopper and gondola cars, but that the cost per car-mile for box cars is no higher in the North than in the South. This arithmetic is illustrated as follows:

Car costs (car repairs, depreciation, and return)

	Cost per car-mile (cents)		
	Official	*South*	*U.S. average*
Box	3.0	3.0	3.0
Gondola and hopper	6.0	3.0	4.5
Other	4.0	4.0	4.0
Average car	4.3	3.3	3.8

The southern lines explain that open top car costs are higher in the North because of the effect on car costs of per diem debits and credits and the mechanics of Rail
63 Form A wherein the per diem computed on reproduction costs is added to or subtracted from a cost based on original cost. The Clinchfield is cited as an extreme case in which the per diem credits are so great that they create a negative figure for the return on investment portion of the car cost. The southern lines conclude that it is wrong to charge, in effect, to boxcars a higher cost caused by the per diem on open top cars through the aggregation of car costs on all types of cars, and, therefore, they use for both territories the United States average car cost.

In rebuttal the northern lines make the following points: First: Open top cars are not more costly than boxcars. They quote the testimony in another proceeding of a southern lines' witness to the effect that, in his opinion, the cost of maintaining a boxcar is considerably higher than the cost or maintaining an open top car. Contending that the purchase price of a car influences both the return and depreciation elements of car cost, northern lines show that in 1959 the average cost of general service boxcars in the United States was $9,851; that of open hoppers, $8,715; and gondolas, $8,409.

Second: In regard to the effect of utilization on the comparative car-mile costs of open hopper cars, the official territory ownership was 40.4 percent and utilization in car-miles was 40 percent whereas the southern region had an ownership of 32.8 percent and utilization of 23.6 percent.

Third: As to the Clinchfield, the northern lines cite the Pittsburgh & Lake Erie in their group as being in the same situation.

The southern line's arithmetical illustration depends entirely on the assumptions that the car-mile cost of gondola and hopper cars is twice as great in the North as in

the South and twice as great as the boxcar costs. There is no sound evidence to support these assumptions. Indeed, the uncontroverted cost and utilization figures furnished by the northern lines render them highly improbable.

We recognize that per diem charges have been based upon car costs computed on a reproduction basis insofar as depreciation and return on investment of the cars are concerned. This differs from the original cost basis used in Form A car cost computations for owned cars. As explained above, the Form A method necessarily includes per diem in the car costs, and is appropriate in situations where, as here, the issues involve divisions of rates on almost all commodities handled in different types of cars, although mainly boxcars, and between numerous carriers throughout both territories. We distinguish the situation here from that presented in *Louisville & N. R. Co. v. Southern Ry. Co.*, 319 I.C.C. 639, sustained in *Carolina & N. W. Ry. Co. v. United States*, 230 F. Supp. 581 (W.D.N.C. 1964), wherein an adjustment for reproduction costs was made. There the sole commodity at issue was coal (not involved here), only a certain kind of car was used and such equipment was owned exclusively by the originating carrier, the traffic moved intraterritorially over only specified segments of each carrier's lines, and the car costs of the destination carrier consisted solely of the per diem charge. As to the Clinchfield, that carrier is also largely a coal road. Such traffic is not at issue here, and, in any event, that carrier's situation is offset by that of the Pittsburgh & Lake Erie.

There are very real differences in the car costs in each territory and the causes are known. Among these causes are: a difference in utilization of 39.4 car-miles per
64 day in the North and 49.5 car-miles per day in the South; differences in tax and wage rates; and a difference in the relative amount of off-line use of owned cars in all territories. Moreover, there is a greater relative

use in connection with the traffic here at issue of cars owned by official territory railroads than of cars of southern ownership. Eliminating cars of other ownership for purposes of comparison, cars owned by official territory railroads made 54 percent of all car-miles although only 41 percent of those car-miles were run in official territory.

The use of a national average car cost conceals territorial differences in cost which are important in the consideration of divisions between the two involved territories. Accordingly, separate territorial freight train car costs will be used in our restatement.

f. Freight car empty return ratios.—The southern lines take the general position that the history of costs reflects a refinement away from system average costs. Form A departs from overall system average costs by separating line-haul and terminal services, assigning costs on the basis of load per car, and separating tare weight and empty return ratios by type of car. Territorial empty return ratios for all types of cars were broken down into empty return ratios for each of six types of cars in the first 7-day study (August 15, 1948, to July 11, 1949) and for each of 10 types of cars in the second 7-day study[1] (October 22, 1956, to August 18, 1957). Dividing "gondola and hopper" into three types and "flat" into two types of cars is said by the southern lines to be a necessary refinement of the empty return ratios. Further refinement of empty return ratios among the kinds of boxcars and refrigerator cars is, according to the southern lines, consistent with cost finding development and necessary to measure more accurately the costs of the traffic at issue.

The southern traffic study shows that 69.3 percent of the car-miles are incurred by boxcars and 9.7 percent by refrigerator cars. The southern lines changed the empty

1. Cost section statement No. 6-57, "Percent of Empty to Loaded Freight Car-Miles by Class of Equipment and Performance Factors for Way, Through and All Trains Combined."

return ratios from 39 percent in official territory and 33 percent in southern region for all boxcars to 100 percent for auto parts traffic and 30 percent for the remainder of the boxcar traffic in both territories, and the empty return ratios for refrigerator cars in official territory from 90 percent to 75 percent and in southern region from 76 percent to 84 percent. The effect of these adjustments increases the proportion of costs in the South by 0.51 percentage point.

(*1*) *Boxcars.*—The northern lines in applying Rail Form A used empty return ratios based on the second 7-day study of loaded and empty car-miles which produced for each group a single ratio covering all types of boxcars and another ratio covering all ownerships of refrigerator cars. In this category of boxcars are general purpose cars which can be utilized by and are available to all shippers for loading all types of commodities not requiring special type equipment, and boxcars suitable for loading special commodities which, though they may be suited for some type of return load, are in assigned service and thus returned empty, with some exceptions, to the point of loading. Included therein are cars used for transporting auto parts, which are specifically designed to handle such commodities. This 100-percent empty return ratio for specially equipped cars is contrasted by the southern lines with average ratios of less than 40 percent for all boxcars including the assigned cars.

65 The southern lines present the following in support of their adjustment:

(a) A computation showing that if special boxcars have an empty return ratio of 100 percent and general boxcars one of 30 percent, or if special boxcars account for 13 percent of loaded boxcar-miles in the North and 4 percent in the South, the result will be an overall empty ratio of 39 percent in the North and 33 percent in the South, which is what the 7-day study produced.

(b) A showing of the Commission's Transport Statistics of the United States for 1956 as follows:

Boxcars owned

Territory	*Total*	*Special device*	*Percent special device is of total*
Eastern district	267,266	26,779	10.03
Pocahontas region	32,834	1,501	4.57
Eastern plus Pocahontas	300,100	28,280	9.42
Southern region	100,191	4,122	4.11

The southern lines contend that the above indicates that the southern carriers own substantially fewer special device cars than do the eastern or official carriers involved in this proceeding.

(c) The following showing of the relationship in each territory between the amount of traffic commodity class No. 623, Vehicle Parts, N.O.S., and Total Manufactures and Miscellaneous based on carloads originated and terminated and on freight revenue:

VEHICLE PARTS 623—1956

	Eastern district plus Pocahontas region (1)	*South* (2)	*Total (column 1 plus column 2)* (3)	*Percent South of total (column 2 and column 3)* (4)	*Percent eastern district plus Pocahontas region of total (column 1 and column 3)* (5)
	Carloads originated and terminated				
Vehicle parts, N.O.S.	829,934	62,033	891,967	6.95	93.05
Manufactures and miscellaneous	12,669,348	3,787,287	16,486,635	23.01	76.99
Percent vehicle parts	6.55	1.64			
	Freight revenue				
Vehicle parts, N.O.S.	$130,212,468	$19,329,691	$149,542,159	12.93	87.07
Manufactures and miscellaneous	$1,827,508,648	$625,523,731	$2,453,032,379	25.50	74.50
Percent vehicle parts	7.13	3.09			

66 The southern carriers contend that the foregoing demonstrates that they participate to a much more limited extent in vehicle parts traffic than to the official carriers.

(d) The following showing of the empty return ratio of boxcars and the proportion of vehicle parts traffic to all traffic in boxcars for each of the three groups of railroads:

	Boxcars empty return ratio [1]	*Percent vehicle parts 623 to total boxcar traffic* [2]
	Percent	*Percent*
Roads serving Detroit having heavy proportion of vehicle parts to total boxcar traffic [3]	49	14.5
Other official	34	4.2
Total official	39	6.8
Southern region	33	2.6

[1] Second 7-day study.

[2] Percent carloads of vehicle parts 623 handled in boxcars and percent carloads of all traffic handled in boxcars from statement No. TC-3,1956, applied to total carloads handled, vehicle parts and total carloads all traffic, respectively, from Freight Commodity Statistics, Year 1956.

[3] NYC, Wabash, C&O, DTI, and GTW.

(e) A statistical showing of the effect on the empty return ratio from the elimination of vehicle parts traffic. The waybill study does not show for interterritorial traffic the number of car-miles in each territory. Therefore, this missing element was approximated by combining certain items and proportions in the waybill study with originations and terminations and revenues from the Freight Commodity Statistics. The final result after eliminating vehicle parts traffic shows an empty ratio which is 4 percentage points higher in official territory than in southern region.

These five items will be analyzed below:

(a) This is merely a computation showing what the effect would be if certain assumptions are made. By itself,

it does not prove that those conditions actually exist, nor is there other sufficient evidence to this effect.

(b) This shows the percentage ownership of boxcars by railroads in these territorial groups. Cars are interchanged among territories and it is quite probable that cars of eastern ownership travel many car-miles in the western district. It is the car-miles in each territory which affect the empty ratio, and the relative ownership does not necessarily coincide with the relative number of car-miles.

(c) The use of the relationship between the numbers of carloads and the revenues of vehicle parts to total manufactures and miscellaneous group of commodities does not measure the relationship of special boxcars to total boxcars for the reason that many boxcars carried commodities other than manufactures and miscellaneous, and vehicle parts do not all move in special boxcars.

(d) The comparison is based on only three observations and is therefore too limited to be representative. At best, it may be a coincidence or caused by some unknown factor, and is not otherwise supported.

67 (e) The statistical determination of the effect of special cars on the empty return ratio for all boxcars is based on certain assumptions, such as that commodity class No. 623, Vehicle Parts, N.O.S., moves in special cars only and that all special cars have a 100-percent empty return. These assumptions have not been proven. In fact, 12 percent of the vehicle parts move in other than boxcars. This statistical determination is an attempt to show an effect on the empty ratio with mathematical exactness. However, such a degree of accuracy is inappropriate in this particular computation because the individual steps taken to arrive at the answer contain estimates or approximations with a wide margin of error. For example, the percentage distribution of intraterritorial car-miles includes different amounts of car-miles by other than boxcars in each terri-

tory. The equating factors for revenue are also only very rough approximations.

There are undoubtedly instances where specially equipped or directly assigned boxcars have a 100-percent empty return. The record does not indicate, however, whether this is generally prevalent or whether it approaches 50 percent or 100 percent for this class of cars. The five items above tend to show that these cars may have some effect on the empty return ratio, but they do not support a conclusion that any adjustment is warranted here as to the amount of the effect other than that reflected in the averages used.

The southern lines cite the Commission's decision in *Louisville & N. R. Co. v. Akron, C. & Y. R. Co.*, 309 I.C.C. 491, the *Border Point* case, as a precedent for adjusting the empty return ratios because of specially equipped cars. The circumstances were different in that case. Most of the line-haul costs were on only one side of the border. In addition to territorial average costs, 1956 systemwide operating costs were computed separately for the Pennsylvania, the Detroit, Toledo & Ironton, the Louisville & Nashville, and the New York Central. In addition, the Detroit, Toledo & Ironton had 2,596 specially equipped cars for use in transporting automobile parts which generally moved loaded from Detroit to Louisville, and returned empty. This type of car constituted more than half of its owned cars in this area. Moreover, the Louisville & Nashville border point traffic was largely composed of vehicle parts and electric appliances moving to or from Louisville. It was necessary to develop specific data for this dominant traffic. In contrast, the instant proceedings embrace a large and varied body of traffic, incurring line-haul costs on both sides of the border, and the 33,983 cars carrying vehicle parts, commodity No. 623, are not at all dominant but, rather, constitute only 3.5 percent of the total number of cars.

It is claimed that the unbalanced flow of traffic to and from Canada contributes to the high empty return ratio in official territory. A study based on Canadian commodity statistics shows that, excluding automobiles and parts, 468,456 carloads were delivered to Canadian connections and 691,316 were received. If every carload going to Canada could be placed in a car coming therefrom which was unloaded here it would produce the following result:

691,316 southbound loads	
468,456 northbound loads	
222,860 empties	19 percent
1,159,772 total loads	100 percent

68 Thus, under ideal conditions, which rarely obtain, an empty ratio on Canadian traffic of 19 percent might be possible. The figures given as to the imbalance in traffic flow do not indicate that Canadian traffic has a greater empty return ratio than other traffic.

The detail of the southern lines' empty return ratio adjustments follow:

	Official territory	*Southern region*
	Percent	*Percent*
All boxcars	38.93	32.50
Less effect of special device cars	4.27	1.62
General purpose boxcars	34.66	30.88
Less effect of Canadian traffic	2.13	0
Less judgment factor	32.53	30.88
	2.53	0.88
	30.00	30.00

The witness for the southern lines summarized this evidence in the following words:

Bearing in mind that the special device adjustment is merely illustrative and that the use of special device cars for other commodities is of relatively greater importance in the highly industrialized east than in the south it is my conclusion that, as far as North-South traffic is concerned, the empty ratio for box cars is no greater in official territory than in the south. In my judgment a fair ratio for either territory would be 30 percent.

In light of the foregoing, we find that: (1) the adjustment for special device cars of 4.27 percentage points is not adequately supported; at best, it is merely illustrative; (2) that the adjustment for Canadian traffic is in error; and (3) that the last adjustment of 2.53 percentage points is purely an unsupported assumption.

(2) Refrigerator cars.—The second 7-day study developed empty return ratios for eastern district of 90 percent, Pocahontas of 86 percent, and southern region of 76 percent. The southern lines urge that these are not representative of North-South traffic because they include meat traffic, of which very little moves between the North and the South and which has a 98-percent empty return. The southern traffic study shows 80,379 refrigerator cars of which only 1,642 or 2 percent are meat. The waybill study shows that based on originations and terminations (not car-miles, which are not available) fresh meats constitute 19.1 percent of refrigerator car traffic in official territory and 7.2 percent in southern region.

The above percentages are based on a single commodity group, No. 215, Meats, fresh, n.o.s. Generally, a group average is not invalidated because one of the items included in the group is above or below the average. It is normal to have items above offset by those below. For example, the Illinois Central Railroad handles a substantial movement of bananas from New Orleans to destina-
69 tions in official territory. Bananas are transported in refrigerator cars owned or leased by the Illinois

Central and assigned to the movement of bananas. These assigned cars have an empty ratio of 100 percent. In considering whether the cars with 100-percent empty return affect one territory more than another, all such cars must be recognized, not just meat cars. The significance of the banana cars, commodity class No. 51, Bananas, fresh, is that whereas there are proportionately more meat cars in official territory, there are proportionately more banana cars in the southern region. Further, banana cars comprise a much greater proportion of North-South traffic. If all refrigerator cars with a 98- or 100-percent empty return had been considered, the showing would have been entirely different than that for meat cars alone.

The southern lines show that the second 7-day study produced varying results for individual days ranging from 96 percent to 66 percent as the empty return ratio for refrigerator cars in the southern region. The empty and loaded refrigerator car-miles of the principal car owning companies in the southern region obtained from replies to questionnaires sent to the southern roads indicate an empty ratio of 84 percent for all traffic (but not all ownerships) in 1956. This coincides with ratio reported by the Association of American Railroads' Car Service Division on Form CS-57A. This empty ratio of 84 percent is considered more accurate by the southern lines than the results of the 7-day study because it is based on records for the full year and is therefore used in their cost study. However, the southern lines are unwilling to accept the empty return ratios for refrigerator cars in official territory developed in either the 7-day study or the CS-57A reports, and use instead an empty ratio of 75 percent which is the experience of Fruit Growers Express in official territory. Fruit Growers Express handles only 43.3 percent of the North-South refrigerator traffic but the loaded and empty refrigerator car-miles of the other companies were not available to the southern lines. In other words, in determining the ratio of empty return to use in official territory,

the southern lines did not consider the empty return experience of all refrigerator cars of ownerships which handle 56.7 percent of the North-South traffic.

The studies of refrigerator car traffic relied on by the southern lines, like the cost section's 7-day study, cover intraterritorial traffic and traffic from and to other territories and are not confined to North-South traffic. However, unlike the 7-day study, they do not include all traffic and they are not on a comparable basis in both territories.

Although neither party utilized the statistics in the computation of their costs, the southern lines in their exceptions to the recommended report and at oral argument urge that we should use these ratios in our restated costs. The CS-57A statistics cover only private line freight cars and omit railroad owned cars. Thus, it is a complete count of loaded and empty miles for only part of the refrigerator cars. We find that the 7-day study, which is a sample of all of the cars, is more reliable.

For the reasons discussed above, we find that the empty return ratios for both boxcars and refrigerator cars developed by the special studies of the southern lines are not as sound an estimate of the empty return incurred by the official-southern traffic as are the 7-day study territorial empty return ratios. The latter reflect the compilation of actual data reported by the railroads on a
70 comparable basis in each territory under an order of this Commission.

g. Short lines (class II railroads).—The southern lines allege the impropriety of pricing out the services of the short lines (class II railroads) on the basis of territorial average class I railroad costs. They measured in their traffic study the amount of service rendered by short line roads, and, in doing so, adjusted their Form A territorial average costs, which were based on class I railroads, to reflect the level of cost of the short lines. They then ap-

scientific sampling plan, a preliminary sample containing
497 cars in 8 batches was drawn. From this, a
73 sample of 83 cars was taken. A further (and controverted) subsample of 41 cars was then produced. Of these 41 cars, 16 were terminated and 25 were originated; 26 were handled by yard engines and 15 by train engines.

The southern lines made switching studies pursuant to Rail Form F of all cars at each of the points in southern region where a car in the sample had originated or terminated. The switch engine minutes per car for origin or destination switching varied from 3.39 at Huber, Ga., to 72.54 at Gadsden, Ala., with an average of 26.03 minutes for all 41 cars.

The 41-car subsample was itself further divided into 10 subsamples and a "standard error" of 2.2 minutes was computed. It is virtually conceded by all concerned that error due to sampling cannot exceed three standard errors or 6.6 minutes. Thus, if all 967,554 cars had been studied, the average thereof would have been within the range of 26.03 minutes plus or minus 6.6 minutes, or between 19.43 minutes and 32.63 minutes per car. The terminal switching cost for the southern region in the South's cost study of all 967,554 cars is based on the 26.03 minutes so developed.

The southern lines adjusted the official territory costs by applying Pocahontas region switching minutes to bituminous coal for the entire official territory and using special minute per car factors for iron ore and anthracite-to-washers in accordance with a method used by the cost finding section in its periodic publication "Distribution of The Rail Revenue Contribution by Commodity Groups." The minutes per car were thereby reduced for these commodities with a corresponding increase for all other commodities.

This adjustment, which increases the costs in official territory, was approved by the examiners because: (1) it

is based on a method found useful in certain situations involving coal and ore operations; (2) its purpose was to exclude the effect of those operations; (3) the traffic at issue does not include coal; and (4) the adjustment was proposed by the southern lines. However, upon consideration of the exceptions and oral argument, and especially the fact that the adjustment applied to official territory only whereas the southern region also has a large volume of coal traffic, we conclude and find that a fairer basis of cost comparison between the two groups of parties will be attained by deleting this adjustment.

Evidence was introduced to show that volume commodities comprise over 37 percent of the total traffic in official territory. The northern lines point out that if volume commodities exert a depressing effect upon system average switching minutes in the southern region, the presence of volume traffic in the North produces, at the very least, a corresponding influence on the northern lines. They also urge that 13 study points used by the southern lines to illustrate the difference between system average and volume commodity switching minutes were handpicked for the sole purpose of showing that volume commodities do depress the territorial average. Thus, it is asserted that they are extreme instances, not typical or representative. Moreover, 2 of these 13 points are also among those studied for the 41-car sample. Thus, with the two points being common to both studies, the northern lines contend that it is necessarily erroneous to conclude that the principal volume commodity movements affect territorial switching costs to the extent claimed by the southern lines. They also point out that respondents' principal witness in a prior case studied 582 loaded and 591 empty cars of pulpwood, a major volume commodity, and found 14.62 minutes for origin
74 switching and 17.81 minutes for destination switching, which is not far from the system average figures.

See *Reduced Rates on Pulpwood in Southern Territory*, 297 I.C.C. 735, 745.

These three contentions, (1) that volume commodities exist in both territories, (2) that the 13 points were hand-picked and that 2 were common to the points sampled as representative of official-southern traffic, and (3) that pulpwood, a volume commodity, has average switching minutes, are cited by northern lines to show that there is no necessity to make an adjustment for volume commodities. They also urge that a sample of 41 cars is too small to be relied on as representative of almost a million cars of study traffic. They show further that the sample included no cars from Boston, Philadelphia, Detroit, St. Louis, or Buffalo, among other large northern cities, and not a single car of citrus or fresh vegetable traffic.

Of the 967,554 cars of official-southern traffic, 46 percent were southbound and 54 percent were northbound, whereas the 41-car sample showed 39 percent southbound and 61 percent northbound. Thus, the 41-car sample showed 7 percent too many origin studies and 7 percent too few destination studies as compared to the total figure. The 25 cars originated had 24.08 minutes per car and the 16 cars terminated had 29.07 minutes per car. The northern lines point out that although southern lines' operating witnesses have almost uniformly taken the position that it is more burdensome to originate a car in the South than to terminate it, the switching studies of the 41 cars show the opposite.

The 26 cars given yard switching averaged 30.75 minutes and the 15 cars given train switching averaged 17.84 minutes. The original sample of 497 cars contained 59.8 percent given yard switching and 40.2 percent given train switching, whereas of the 41 cars, 63.4 percent were given yard switching and 36.6 percent were given train switching. The northern lines point out that to restore in the same sample the 60-40 relationship of yard to train

switching shown in the more comprehensive sample it is necessary to drop four cars of yard switching from the small sample. If the 4 cars dropped were those with the largest number of switch engine minutes, the average per car for the remaining 37 cars would be 22.30 minutes. If the four cars with the lowest number of switching minutes were dropped the average would be 27.48 minutes.

The northern lines assert that the 41 cars were not selected by subsampling but were later assigned to subsamples. They contend that a distortion of the use of subsamples thereby results throwing doubt on the value of the standard error computed therefrom. They point out that the Form A factors are 17.8 minutes for boxcars and 19.8 minutes for other cars, which is an average of about 19 minutes, and that the principal witness on sampling for southern respondents did not claim any greater reliability for the switching study factor of 26.03 minutes than a range of about 7 minutes, the difference being 19 minutes. Thus, they state that even if the studies were to be taken at face value, there is no justification for the conclusion that the involved traffic, assuming it could be found to be fairly typified by the 41-car sample, "an assumption which offends common sense," is significantly different from average traffic in the South in respect of switching service rendered, since the claimed excess over average minutes and the conceded range of reliability of the study are almost exactly the same.

75 As to the 41 switching studies, 40 were conducted in 1960 and 1 in 1957 whereas the 41 cars were handled during the latter half of 1958 or first half of 1959. Switching minutes were developed for each category of service at all industries in the terminal area. Inasmuch as all cars were included in the divisor in each instance, the minutes attributed to each reflect the average traffic and not necessarily the characteristics of official-southern traffic. No investigation was made to determine whether operations were con-

plied these adjusted unit costs to the service units of the short lines. The resulting increase of the southern lines' proportion of the costs by 0.09 percentage point amounted to approximately $446,000 in revenue. They employed the following procedure in their cost study in order to reflect the level of short-line costs:

1. The total costs of each short line that participated in the official-southern traffic were determined from the 1956 annual reports of each carrier.

2. The costs which were imputed to the operations of each short line by the Rail Form A costs of the class I roads were then aggregated.

3. The ratio of the actual costs in 1. above to the cost imputed by the Rail Form A costs of class I roads in 2. above was computed for each short line.

4. And finally, the ratios thus developed were applied to the territorial Form A costs of official-southern traffic on each class II road.

The actual expenses and traffic volume for the year 1956 as reported by the class II carriers in their annual reports were used in computing these costs.

The northern lines objected to the assumption that compilation of 1956 cars originated and terminated were on the basis of 1955 operations, and that the traffic consist, operating characteristics, and the resulting expenses would be the same for 1956 as for 1955. These assumptions were made because the typical short line report in the year 1956 did not contain as much detailed data as the report for the year 1955.

The southern lines' traffic study showed the number of cars originated or terminated on short lines for the official territory and southern region to be:

	Traffic originated or terminated on other than class I line-haul roads participating in official-southern divisions	
	Number of cars	*Percent of cars*
In official territory	16,697	1.73
In southern territory	55,826	5.77

The northern lines do not question the count of car data regarding short lines on the abstracts underlying the southern lines' traffic study, but observe that there are many class II railroads in official territory which perform only switching or terminal service, whose charges for such service are paid entirely out of eastern line-haul carriers' revenue, and whose participation is not ordinarily shown on the abstracts. The southern lines introduced the following table to illustrate the imputation of class I railroads' costs to the services of these:

71

Costs of short lines in year 1956 imputation of class I roads' costs compared with application of the actual costs of the short lines

Source	*North*	*Percent*	*South*	*Percent*
Territorial average Form A costs	$537,359	100.0	$1,594,486	100.0
Southern lines' study of short-lines cost	509,943	94.9	1,963,632	123.2
Difference	—27,416	—5.1	+369,143	—23.2
Northern lines' study of short-lines' cost	496,545	92.4	1,878,029	117.8
Difference	—40,814	—7.6	+283,543	+17.8
Difference between northern lines' and southern lines' studies	13,398	2.5	85,603	5.4

The above table shows that the imputation of class I road cost to the service of these short lines overstates the costs in the North by $27,416 (southern lines' method) or $40,814 (northern lines' method) and understates the costs in the South by $369,146 (southern lines' method) or $283,543 (northern lines' method).

The southern lines' method reflects the cost level of each short line while retaining the separation between line-haul services (car-miles and ton-miles) and terminal services (cars and tons), whereas the northern lines start with the identical actual carload freight cost for each short line as used by the southern lines but, instead, spread the entire costs of each short line over revenue ton-miles, producing an average cost per revenue ton-mile with no separation of line-haul and terminal services.

In our opinion, and we so find, the southern lines' cost study for short lines is the more acceptable procedure in that it conforms to the principle of separating line-haul and terminal costs set forth in Rail Form A. The southern lines' traffic study more closely reflects the actual level of costs of each participating short line, whereas the northern lines imputes to each short line the cost level of class I railroads. Basically, the class II and the class I railroads should reflect their own respective costs. This adjustment is shown in our restatement of the costs.

h. Adjustment of switching costs to eliminate the effect of volume switching at origin and destination.—The territorial average switching minutes per car at origin or destination, 1956, are as follows:

72

	Official territory		*Southern region*	
	Boxcars	*Other cars*	*Boxcars*	*Other cars*
Cost section study application of Form A	25.9	28.8	17.3	19.2
After the effect of southern respondents' adjustments for "Switching and Terminal Cost" and "Corrected Car Count"	25.4	28.2	17.8	19.8
After adjustment for volume switching	27.65	30.72	26.03	26.03
Volume switching adjustment	2.25	2.52	8.23	6.23
Total amount added to costs by this volume switching adjustment	$1,310,743		$3,648,130	
Change in percentage of costs	44.71–44.45=0.26		55.29–55.55=+0.26	

Some volume commodities frequently move in multiple-car blocks at origin and/or destination with a consequently lower switching cost than for commodities usually handled in one car at a time. The following table indicates the significance of certain volume commodities:

	Number of cars originated or terminated (year 1959)—		*Number of cars official-southern traffic involved in this proceeding*
	On official territory roads	*On southern region roads*	*(as shown in southern lines' traffic study)*
Pulpwood	162,572	1,102,741	564
Sand and gravel	340,072	653,972	2,229
Wet phosphate rock	——	287,892	None
Crushed stone and rock	407,630	813,734	8,372
Iron ore	789,188	113,452	661
Coal	6,186,315	1,915,566	None
Coke	558,823	79,984	2,811
Fluxing stone and dolomite	395,811	3,558	51
Total cars of volume commodities	8,840,511	4,970,899	14,758
Total cars	23,771,003	10,840,187	967,554
Percent cars of volume commodities to total cars of all commodities	*Percent* 37.19	*Percent* 45.86	*Percent* 1.52

The southern lines urge that their territorial average switching costs are depressed by the large proportion of volume commodities in their region to the point that these costs are not representative of the official-southern traffic which includes only a small amount of these commodities. For this reason, they used in their cost study origin or destination switching costs based on a special study in the South and on an adjustment in the territorial costs in the North.

As stated, there were 967,554 cars of official-southern traffic in the year studied. From this figure, pursuant to a

ducted in 1960 in a manner similar to the time the sample cars moved, and no comparison was made of the volume of traffic at the study points between the two periods. For example, at least one car in the sample was picked from an "A" abstract containing 82 similar movements during the period of 1 month, and there necessarily must have been at least 3 or 4 cars per day, which suggests multiple-car block switching. However, no determination was made of this latter aspect which would have required a reduction of the switching minutes claimed on a single-car basis. The northern lines made an examination of the switching studies and found six alleged errors amounting to an overstatement of 63.87 minutes out of 1,067.20 minutes. Four of the errors were disputed by the southern lines and two amounting to 21.73 minutes were conceded.

The northern lines point out that the switching minute adjustment was made on an entirely different basis in the North than in the South and that although the increase in switching minutes in the South was 46 percent for boxcars and 31 percent for other cars it was only about 9 percent for both kinds of cars in the North. Since the justification for, and intent of, the adjustments were to offset the effect of volume commodities on the average, the amount of the adjustments would suggest four or five times as much volume commodity traffic in the South; but such is not the case.

Northern lines also take the position that assuming that comparable methods had been followed in furtherance of the sought purpose of the switching adjustments the net effect of such an adjustment upon relative costs would have been virtually nil. They assert that this would appear to be so because of the similar, and hence at the very least offsetting, consist of the general traffic of northern and southern lines in terms of the respective proportions of volume commodities handled by each.

This offsetting effect can be approximated for official territory by the following computations, the first of which

assumes that volume switching minutes are the same as in the southern region, and the second that volume switching minutes are greater in the same proportion as the territorial average:

76

	Proportion of cars originated or terminated	*Switching minutes per car*	
Southern region:	*Percent*		
All commodities (regional average)	100.00	× 19.2	= 19.2
Other than volume commodities	54.14	× 26.03	= 14.1
Volume commodities (remainder)	45.86		5.1
Volume commodities (5.1 ÷ 45.86 percent)		11.1	
Official territory:			
All commodities (territorial average)	100.00	× 27.3	= 27.3
Volume commodities	37.19	× 11.1	= 4.1
Other than volume commodities (remainder)	62.81		23.2
Other than volume commodities (23.2 ÷ 62.81 percent)		36.9	
Official territory:			
All commodities	100.00	× 27.3	= 27.3
27.3			
Volume commodities (19.2 × 11.1 = 15.8)	37.19	× 15.8	= 5.9
Other than volume commodities	62.81		21.4
Other than volume commodities (21.4 ÷ 62.81 per cent)		34.1	

Assuming the same difference between boxcars and other cars, the switching minutes per car for other than volume commodities in official territory should be:

	All cars	*Boxcars*	*Other cars*
First computation	36.9	34.3	38.1
Second computation	34.1	31.7	35.2
Used in southern lines' cost study		27.65	30.72

The above computations indicate that the adjustment of switching minutes for official territory made by the southern lines is inadequate by from 4 to 7 minutes in comparison with the adjustment they made for their own region, and are therefore rejected.

Territorial average costs are particularly appropriate to the traffic in this case because it is a large and varied body of traffic moving to and coming from terminals in all parts of both territories. In our opinion, and we so find, the depressing effect, if any, of volume switching commodities on the average would affect both territories and, for purposes of comparison, would be largely offsetting.

The switching studies in the South have weaknesses, both in the sample and in the studies themselves. The adjustment in the North was not made on a basis comparable to that in the South, and here, where the relationship of North and South is of prime importance, this is a major defect.

77 For these reasons, we conclude that the contentions of the northern lines are of merit and that Rail Form A territorial average switching costs more accurately measure the relative switching costs on each side of the border of the official-southern traffic than the switching costs computed by the southern lines.

i. Train tonnage adjustment.—The large volume of coal traffic on the Chesapeake & Ohio and Norfolk & Western railroads has a depressing effect on the costs of other traffic because it moves in heavier than average trains. Based on merchandise traffic movements on the Chesapeake & Ohio in trains of 3,200 tons and on the Norfolk & Western in trains of 5,128 tons, the southern lines adjusted the

through train weights used in their cost computations as follows:

	Official territory	*Eastern district*	*Pocahontas region*
Territorial average before adjustment (tons)	3,840	3,434	5,426
After adjustment	3,611	3,434	4,121

This adjustment had the effect of increasing the costs in the North by $867,319 without any change in the costs of the South and resulted in a decrease of the South's proportion of the costs of 0.14 percentage point. This adjustment was necessitated by the proper inclusion of Pocahontas region costs in those of the northern lines and is therefore warranted.

j. Adjustment of constant costs.—The southern lines made two adjustments to constant costs: one, the exclusion of passenger suburban service deficits, and the other, the inclusion in the southern lines' costs of the fully distributed cost deficits on pulpwood and wet phosphate rock which they consider to be related (in transit) to the outbound movement of paper products and dry phosphate rock.

(1) Suburban passenger service deficits.—The southern lines contend that the basic reason justifying the inclusion of passenger service deficits as a part of the cost of providing freight services is that such passenger deficits are almost entirely attributable to the apportioned costs of common facilities which must be incurred in any event to provide freight service. They would include the passenger deficits from intercity service in the constant costs assigned to freight service, but they would exclude the deficits from suburban passenger service for the reason that the suburban service facilities are separate and not used in common with the freight service.

They excluded from the cost of official-southern traffic north of the gateways the amount of $2,830,575, based on

data presented on behalf of eastern territory suburban railroads before the Senate Committee on Interstate and Foreign Commerce in April of 1960 regarding the suburban service of the Boston & Maine, New Haven, New York Central, Delaware, Lackawanna & Western, Central of New Jersey, Erie, Pennsylvania, and Reading railroads. The amount ($377,070) excluded south of the gateways is based on the suburban service deficit of the Illinois Central Railroad.

The northern lines point out that, putting aside entirely the common expenses that are apportioned between freight and passenger service and considering only expenses that are solely related to passenger service, there is a
78 deficit in the southern region whereas in both the eastern district and in official territory the passenger revenues exceed the solely related expenses. Further, in relation to the cost of handling official-southern freight traffic, they contend that there is no difference between that part of the passenger deficit which results from suburban operations and that part which results from through or local passenger trains. They also assert that if the southern lines should not properly be charged with any part of the deficit in handling commuters from "A" to "B" in the East, it would logically follow that the northern lines should not be charged with any part of the deficit in handling passengers from "X" to "Y" in the South.

The southern lines state that the suburban service deficits of the northern roads could be eliminated by the discontinuance of commutation service since the separate facilities maintained solely for suburban service are not used for freight or intercity passenger service. They give the following example: "—Reference to Exhibit J exemplifies the situation which actually exists. It shows track occupancy by various types of trains in the twenty-four hours of a typical week-day of October 1958 on the line of the Pennsylvania Railroad between Overbrook and Bryn Mawr, Penn-

sylvania, which is a portion of one of that company's principal Philadelphia suburban lines. It will be noted that there are four main tracks in this territory. The outside track—No. 1, Eastbound and No. 4, Westbound—are used primarily by suburban trains: while the middle tracks (Nos. 2 and 3) are used primarily for through passenger and freight trains."

It is true that, in the example given, certain track expenses for tracks Nos. 1 and 4 could be saved by abandoning the suburban service and those tracks; however, other costs related to the roadway would continue, such items as land taxes, grading, ditching, culverts, bridges, and signaling systems. Many large passenger terminals are used by both suburban and intercity passengers. In other words, although many individual items of suburban service can be considered solely related, the facilities and service as a whole cannot be considered solely related to suburban service and treated entirely apart from the freight service and intercity passenger service. Because the suburban service deficit includes common costs which must be incurred to provide freight service or intercity passenger service, such costs are properly chargeable to those services to the extent they cannot be recovered from suburban operations, and the deficit from suburban operations should not be excluded from the constant costs. We so find.

(2) Constant cost of transit commodities.—The southern lines included the following amounts in their costs:

Pulpwood	$7,221,986
Wet phosphate rock	615,883
Total	7,837,869

These amounts represent the constant costs not covered by the revenue and deficits sustained by the southern lines in handling, within the South, these commodities into mills which originate South-to-North outbound traffic of paper and paper products and dry phosphate rock.

Both groups have included in their traffic and cost studies the service from point of origin to destination of traffic identified on the interline abstracts as transit traffic.

79 The pulpwood and wet phosphate rock movements are not so identified, and the tariffs for them do not provide for through rates from the points of origin of the raw materials. However, the southern lines claim that a situation, essentially of a transit nature, exists because they maintain rates on the inbound wet phosphate rock and pulpwood which are conditioned upon the outbound movement by rail of the dry phosphate rock and paper products.

The revenue on pulpwood contributes approximately $5 million per year in excess of out-of-pocket costs, whereas the ton and ton-mile method of distribution assigns about $21 million of constant costs to pulpwood. Therefore, say the southern lines, the constant costs in excess of the contribution of pulpwood ($21 million minus $5 million) must be recovered from the high-rated paper and paper products, including southern-official paper traffic. Approximately 54 percent of the paper and paper products originated by the southern lines moves to destinations in official territory, and this traffic produces revenues 36 percent greater than fully distributed costs.

The southern lines urge that they maintain the low rates on the inbound raw materials in order to hold the outbound high-rated paper and dry phosphate rock traffic to rail movement for the benefit of all carriers participating in the haul, and since the northern lines participate in the movement of this high-rated traffic they cannot deny the southern lines divisions which reflect the services performed as an integral part of the joint enterprise.

The northern lines made three principal points in rebuttal:

First: The northern lines can make an even better cost showing on the basis of out-of-pocket costs:

Eastern percentages of total costs on general traffic at average hauls.

Year 1956 Fully distributed 50.7 percent
Out-of-pocket 51.7 percent
Year 1957 Fully distributed 50.9 percent
Out-of-pocket 52.0 percent

Even if fully distributed costs should be completely disregarded the northern lines' case would not suffer, yet the whole basis of the suggested adjustment depends on the use of fully distributed costs which assign the constant expenses on a ton and ton-mile basis.

Second: The wet phosphate rock and pulpwood move wholly within the South, and the northern lines have no participation in their rates, no control over them, and no voice as to their level. These rates on pulpwood "were made on a low basis to attract plants from the North, and now the southern lines want the Commission to require eastern lines to help make up the deficit under constant costs which they incur." The northern lines also point out that another reason for the low level of rates on pulpwood and wet phosphate rock is competition from other modes of transportation, and that any commodity which earns $5 million above out-of-pocket costs is very worthwhile.

Third: The northern lines urge that this adjustment cannot be made by the southern lines in their territory alone but, to be fair, must also be made in the territory of the northern lines with respect to the movement of such raw materials as iron ore and coal and fluxing stone, for example, which go into the manufacture of iron and steel which move from North to South, and as to which there could be no movement without the prior movement of the raw material.

The southern lines justify their adjustment on the basis of an essentially transit relationship on pulpwood and wet phosphate rock. On this point, the northern lines contend that a transit relationship is one that is readily identifiable from the tariff and either exists or does not exist. If an actual transit relationship exists, they assert that the through rates from the initial origin of the raw material via the transit point to the ultimate destination of the finished product would here be in issue if that movement were between the territories involved. In that situation, the through cost would likewise appropriately be considered in fixing divisions. But, they note, no transit is here provided by the appropriate tariffs.

They further point out that the only joint interterritorial rates here before the Commission are those applying on paper and paper products and on dry phosphate rock. They characterize the so-called transit arrangement as, at best, a recognition of the obvious physical fact that the production of finished and semifinished products necessitates an inbound flow of basic materials.

The southern lines' position that losses on pulpwood and wet phosphate rock are incurred in behalf of a joint enterprise (paper and dry phosphate rock traffic), in which the northern lines share, is largely refuted by the evidence that these rates yield revenues profitable to the extent of $5 million a year above out-of-pocket costs.

The transfer to paper products and dry phosphate rock of that portion of the constant costs allocated to pulpwood and wet phosphate rock which the revenue fails to cover is based on a misunderstanding of the nature, significance, and use of constant costs. Each shipment must pay its out-of-pocket costs since they are incurred by and because of that shipment. However, the constant costs, because they are incurred on behalf of the operation as a whole, should

be shared by all traffic. In our judgment, the ton and ton-mile apportionment of constant costs made in the same way in each territory on this large and varied body of traffic is fair to both territories, and the transfer to interterritorial traffic of a part of the constant costs which had been assigned to intraterritorial traffic is not well founded. Stated in another way, we cannot find that for purposes of interterritorial divisions the pulpwood and wet phosphate rates within the South are so specifically and intrinsically related to the rates under consideration that there is a sound basis here for the adjustment made by the southern lines. *Cf. American Sugar Refining Co. v. Ahnapee & W. Ry. Co.*, 322 I.C.C. 717, 720; *Sugar from the West to Central Territory*, 319 I.C.C. 686, 705.

k. Equalization of gateway interchanges.—The cost study submitted by the southern lines does not include an adjustment for equalization of interchange costs at gateway points although their operating witnesses testified that at many of the important gateways the amount of service and the joint yard cost are equalized. However, they did equalize the amount of service performed by each railroad through the equalization of engine-hours operating on each other's rails. It was estimated that if all the cars of North-South traffic, except those interchanged at interior Illinois and Indiana points, were interchanged at equalized gateways, the cost in official territory would be reduced $797,043, and the costs in southern region would be increased a like amount.

81 There are several weaknesses in this estimate. Initially, equalizing the number of engine-hours performed on the other lines' rails does not equalize interchange service because each carrier performs a major part thereof on its own rails. Secondly, although many important gateways are cited, not all are included, and the proportion of cars passing through unequalized gateways is

not shown. Thirdly, the cost of engine time is not equal in the two territories. There is another, and major, criticism of this proposed adjustment. Rail Form A territorial costs produce a cost which is an average for all the service units in the territory, such as interchange handlings. When greater or lesser costs than Form A costs are assigned to particular items, then lesser or greater costs of corresponding amounts must be assigned to the remaining units. Unless this is done, a situation exists where either more dollars are assigned to all the service units than were actually expended, or only part of the dollars incurred are assigned and some are left over and not assigned to anything. It would create a distortion to assign a cost different than average to 880,711 interchange handlings without a corresponding adjustment in the cost of those remaining. As the northern lines explain:

Another substantial objection to the suggested adjustment is that it would be incomplete. If southern lines are assumed to have incurred interchange costs at the gateways at the rate of $4.045 per interchange as compared with their 1956 Form A average of $3.14, that would necessarily mean that their costs for other interchanges would be reduced by $797,043. Conversely, the corresponding adjustment of northern gateway interchange costs would require an *increase* of the same sum in the costs of other interchanges in official territory. But in proposing the making of such adjustment in respect to this item the southern lines did not attempt to show to what extent their costs of the other interchanges on the traffic involved would be *decreased* or to what extent the northern costs of other interchanges would be *increased*. Further, they presented no such data as would permit the completion of such an adjustment.

For the reasons indicated above, we do not accept the proposed adjustment.

APPENDIX C

Scales of prorating factors prescribed

Distance	*Column 1*	*Column 2*	*Column 3*	*Column 4*	*Column 5*	*Column 6*
50 miles ..	82	61	65	49	127	33
100 miles ..	114	90	77	58	187	65
150 miles ..	146	119	89	67	247	97
200 miles ..	177	148	101	76	307	129
250 miles ..	209	177	113	85	367	160
300 miles ..	241	206	125	94	427	192
350 miles ..	273	235	137	103	487	224
400 miles ..	305	264	149	112	547	256
450 miles ..	336	293	161	121	607	288
500 miles ..	368	321	174	131	—	319
550 miles ..	400	350	186	140	—	351
600 miles ..	432	379	198	149	—	383
650 miles ..	464	408	210	158	—	415
700 miles ..	495	437	222	167	—	447
750 miles ..	527	466	234	176	—	478
800 miles ..	559	495	246	185	—	510
850 miles ..	591	524	258	194	—	542
900 miles ..	623	552	270	203	—	574
950 miles ..	654	581	282	212	—	606
1,000 miles ..	686	610	294	221	—	637
1,050 miles ..	718	639	306	230	—	669
1,100 miles ..	750	668	318	239	—	701
1,150 miles ..	781	697	330	248	—	733
1,200 miles ..	813	726	342	257	—	764
1,250 miles ..	845	755	354	—	—	796
1,300 miles ..	877	783	367	—	—	828
1,350 miles ..	909	812	379	—	—	860
1,400 miles ..	940	841	391	—	—	892
1,450 miles ..	972	870	403	—	—	923
1,500 miles ..	1,004	899	415	—	—	955
1,550 miles ..	1,036	928	427	—	—	987
1,600 miles ..	1,068	957	439	—	—	1,019

Definitions

Northern lines are defined as those assigned to the eastern district and Pocahontas region, except the Norfolk, Franklin and Danville Railway Company, and include the Toledo, Peoria & Western Railroad Company.

Southern lines are defined as those assigned to the southern region, and, in addition, the lines of the St. Louis-San Francisco Railway Company in southern territory and the line of the Norfolk, Franklin and Danville Railway Company west of Suffolk, Va.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 3d day of February A. D. 1965.

No. 29885

OFFICIAL-SOUTHERN DIVISIONS
IN THE MATTER OF DIVISIONS OF JOINT RATES BETWEEN OFFICIAL AND SOUTHERN TERRITORIES

No. 29799

AKRON, CANTON & YOUNGSTOWN RAILROAD COMPANY, ET AL.

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, ET AL.

It appearing, That a full investigation of the matters and things involved in these proceedings has been made, and that the Commission, on the date hereof, has made and filed a report on further hearing containing its findings of fact and conclusions thereon, which said report on further hearing is hereby referred to and made a part hereof:

It is ordered, That the Georgia & Florida Railway Company and the Norfolk, Franklin and Danville Railway Company, be, and they are hereby, made respondents in Docket No. 29885.

It is further ordered, That the complainants, cross-complainants, defendants, and respondents, according as they participate in the transportation, be, and they are hereby, notified and required to establish on or before April 20, 1965, and thereafter to apply, divisions of joint all-rail interstate rates for the transportation of property between points in official territory, on the one hand, and, on the

other, points in southern territory, determined as provided in said report on further hearing.

It is further ordered, That the said complainants, cross-complainants, defendants, and respondents be, and they are hereby, notified and required to cease and desist, on or before April 20, 1965, and thereafter to abstain from asking, demanding, collecting, or receiving divisions of said joint rates upon bases other than those prescribed in said report on further hearing.

It is further ordered, That the order entered herein on January 12, 1953, as amended by order dated May 26, 1953, and the subsequent orders entered herein to the extent such said subsequent orders vacated or modified said order of January 12, 1953, as amended, be, and they are hereby, vacated and set aside as of the date the divisions prescribed in said report on further hearing become effective.

And it is further ordered, That this order shall continue in force until further order of the Commission.

By the Commission.

BERTHA F. ARMES,
Acting Secretary.

(SEAL)

449

INTERSTATE COMMERCE COMMISSION

No. 29885 [1]

OFFICIAL-SOUTHERN DIVISIONS

IN THE MATTER OF DIVISIONS OF JOINT RATES BETWEEN OFFICIAL AND SOUTHERN TERRITORIES

Decided May 18, 1965

Upon petition of Norfolk Southern Railway Company, proceedings as they relate to specified traffic of that carrier reopened for reconsideration and findings modified accordingly. In all other respects, upon further consideration and amplification, findings in prior report, 325 I.C.C. 1, prescribing new just, reasonable, and equitable divisions of joint interterritorial rates between official and southern territories affirmed.

Appearances as shown in prior report.

SUPPLEMENTAL REPORT AND ORDER OF THE COMMISSION ON FURTHER CONSIDERATION

FREAS, *Commissioner:*

In the prior report herein [2] at 325 I.C.C. 1, we found, upon further hearing, that the existing divisions of joint interterritorial rates between official and southern territories were unjust, unreasonable, and inequitable. Just, reasonable, and equitable divisions were prescribed. Subsequently, on April 12, 1965, in civil action No. 15454,

1. This report also embraces No. 29799, Akron, Canton & Youngstown Railroad Company, et al. v. Aberdeen & Rockfish Railroad Company, et al.

2. Referred to and made a part hereof.

Aberdeen and Rockfish Railroad Company, et al. v. United States, the United States District Court for the Eastern District of Louisiana, New Orleans Division, the Honorable E. Gordon West, entered an order temporarily restraining our order prescribing the aforesaid divisions from taking effect on April 20, 1965. Such action had the effect of temporarily mooting the request in the petition of the Norfolk Southern Railway Company, filed April 1, 1965, for
450 postponement of the said effective date pending determination of its request for reconsideration of the report and order insofar as it affects "traffic moving between points on Norfolk Southern and points in official territory via the gateway of Norfolk, Virginia."

Since the enactment of section 15(6) as part of the Transportation Act of 1920, it has been our policy in interterritorial divisions cases to employ a group method or system of determining just, reasonable, and equitable divisions. Because of the number of carriers and the numerous rates and divisions involved, the actual necessities of procedure and administration have required the adoption of such a method in order to accomplish the task imposed upon the Commission by Congress. *New England Divisions Case,* 261 U. S. 184, 196-9 (1923). To avoid serious injustice to any carrier, our procedures permit any railroad to be excepted from a group order, in whole or in part, on a proper showing of differing circumstances. Where it is demonstrated by competent and reliable evidence that a carrier's financial or revenue needs situation requires the preservation of its share of the joint rates on the same level as presently existing or at a level different than that to be maintained for the group as a whole, we may provide special individual treatment in order to maintain such carrier as part of the Nation's transportation system without regard to its costs of rendering the service.

On the basis of such a special showing by the Norfolk Southern, we conclude in our prior report that to prescribe

divisions for Norfolk Southern's originated and terminated traffic moving through the Norfolk gateway on the same basis as prescribed for other southern carriers in finding 2 would place that carrier in a deficit position so serious as to impair the rendering of adequate and continuous service to the public. Accordingly, our findings in the prior report, 325 I.C.C. 1 at pages 44, 51-52, sought to retain for the Norfolk Southern a percentage of revenue substantially the same as it presently receives on such traffic. A special scale was prescribed in column 5 of appendix C which increased the column 2 factors applicable to other southern carriers by 108 percent in order to give the Norfolk Southern approximately the same total revenue it now enjoys on shipments originating or terminating on its line and moving via the Norfolk gateway. We constructed column 5 on the basis of the only available evidence of record concerning an average haul formula which the Norfolk Southern urged would produce reasonably reliable results and achieve the end sought.

451 In its petition for reconsideration, however, the Norfolk Southern now asserts that the prorating factors of column 5 fail to preserve its revenue from the traffic in question by a substantial margin estimated to be $106,000 annually ($89,160 from general traffic and $17,699 from perishable traffic). This total amount is computed by expanding to an annual basis the application of the prescribed column 5 factors to waybills of all individual shipments of general traffic moving during the months of March 1958 and November 1959, and for perishable traffic moving during the 1959 season, the latter being admittedly incomplete and preliminary. Although these waybills covering individual shipments constitute the underlying data for the Norfolk Southern's traffic study, they are not of record in these proceedings. Petitioner makes no request to reopen the proceedings for further hearing for the purpose of introducing this evidence in the form of a more detailed study which would provide a more accurate means of con-

structing a special scale of prorating factors to preserve its *status quo.* It merely requests reconsideration and revision of the column 5 scale by the addition of 15 integers to each prorating factor in each mileage block of that scale.

Under the circumstances, it would ordinarily be improper for the Commission to base any supplemental order increasing the prorating factors in column 5 of appendix C on extra record facts. Moreover, the facts now relied upon by the Norfolk Southern are not based upon newly discovered evidence and, as such, fail to meet the appropriate test as specified in *Yourga v. United States,* 191 F. Supp. 373, 376-7 (W. D. Pa. 1961). The Norfolk Southern's petition merely represents a change in theory from that originally urged as a reliable method of constructing a scale of divisional factors which would preserve its *status quo.* Generally, all carriers subject to regulation under the provisions of the Interstate Commerce Act should be admonished against piecemeal trials. *Cf. Mechling Barge Line, Inc. v. United States,* 376 U. S. 375, 383-386 (1964). Ordinarily, any attempt to have the Commission revise its findings in response to a theory different from that originally urged by a party and adopted by the Commission tends to frustrate the administrative process and should not be countenanced in the absence of unusual circumstances. There is, however, such a circumstance present here which requires consideration.

In reply to the Norfolk Southern's petition, the northern lines assert:

> 452 Notwithstanding the insufficiency of the facts alleged in the petition to support the reconsideration or order sought, the Eastern railroads respondent herein, in order to simplify the issues in the said Court action, and to secure the prompt establishment of a uniform, simple, and readily applicable basis of divisions on the Norfolk gateway traffic originated or terminated by the Norfolk Southern, without prej-

udice to their position otherwise, and fully reserving their rights to apply for modification thereof as conditions may warrant, hereby consent to modification of the Commission's report and order of February 3, 1965, so as to increase, by 15 integers, each of the factors contained in Column 5 of Appendix C of the Commission's said report (325 I.C.C. 82).

We consider this consent of the northern lines to be, in effect, an agreement with the Norfolk Southern concerning divisions on the Norfolk gateway traffic under discussion. The question is whether we should modify our findings and the column 5 scale to include an additional 15 integers in each factor thereof in view of the incomplete state of the record. Divisions cases are in the nature of contractual disputes between carriers. Here, as elsewhere in the law, settlements should be encouraged. *Cf.* Administrative Procedure Act, section 5(b). Since the parties themselves are in agreement,[3] we see no reason to object to this course of action. From all that appears, the basis agreed to reflects a reasonable accord. We therefore approve the agrement as just, reasonable, and otherwise equitable. We further find that the northern lines' consent to an increase of each of the prorating factors in column 5 of appendix C by 15 integers warrants modification of that scale at this time to reflect the agreement of the parties concerned. The ends of justice would be better served by incorporating such agreement in our findings which, all parties agree, place the Norfolk Southern's divisions on a systematic basis for the first time by prescribing a modernized scale of divisional factors. As usual, the parties will be permitted to apply for modification thereof as conditions may warrant.

It should be noted, however, that the restraining order issued on April 12, 1965, in the pending court action en-

3. A circumstance rather unusual, unfortunately, in interterritorial divisional proceedings.

joins our prior order from taking effect on April 20, 1965, with respect to all divisional scales prescribed, pending hearing and determination of an application for interlocutory injunction by the three-judge statutory court. Varous protective conditions concerning repayment on the prescribed bases back to April 20, 1965, are offered in the event of either a grant or a denial of the interlocu-
453 tory injunction. Under the circumstances, our order herein prescribing an increase in the prorating factors of the column 5 scale for the Norfolk Southern will be effective from the date therein specified. However, actual settlement on the basis of the new divisions shall be postponed pending decision of the court on the application for interlocutory injunction and, thereafter, shall be governed by the court's order granting or denying said injunction and any protective payback conditions which may be imposed therein.

Insofar as the complaint in the pending court action is concerned, it has been brought to our attention that it alleges, *inter alia*, the following:

> The Commission's report contains no findings which relate to evidence of record the specific cost factors used in the construction of the divisional scales which it prescribed. Plaintiffs are unable to trace these cost factors to evidence in this record. From the record, it can be calculated that the application of the divisional scales prescribed by the Commission would reduce the revenues of the Southern railroads by $8,745,000.

Had this allegation been made by the filing with us of an appropriate petition as is plaintiffs' right, it would have been given full and proper consideration. In any event, we deem it to be in the public interest, and indeed our duty, to make our position and findings as clear and specific as possible insofar as the aforesaid matters are concerned.

Turning first to the allegation that the prior report contains no findings which relate to evidence of record the specific cost factors used in the construction of the divisional scales prescribed, we will amplify our prior discussion at 325 I.C.C. at pages 24-26 and 34-38. Specifically, the appendix hereto demonstrates, in detail, with appropriate references to the record, the manner of the construction of the scales. The fully distributed cost factors used are clearly shown as are the mathematics of their utilization. Reading the aforesaid discussion in light of this appendix, it is clear that the cost scales are based solely on evidence of record and are directly related to the specific cost factors involved. In so finding, we affirm our prior conclusions.

With regard to the asserted reduction in the revenue of the southern railroads by $8,745,000, the prior report indicated a difference of $7,948,004 as a reduction for the southern lines and as a gain for the northern lines. 325 I.C.C. at page 50. Our prior figure represented an overall estimate relating and applying the percentage of costs to the total revenue involved. To the extent that the
454 higher figure now urged by southern lines may reflect a more detailed picture when related to past individual movements, it does not warrant a change in our findings. The scales prescribed still reflect the restated costs of record and, for the reasons indicated in the prior report, can properly serve here as a guide for the determination of just, reasonable, and equitable divisions. *Cf. Louisville & N. R. Co. v. Southern Ry. Co.*, 319 I.C.C. 639, 657-658, sustained in *Carolina & N. W. Ry. Co. v. United States*, 230 F. Supp. 581 (W.D. N.C. 1964), affirmed *per curiam* by the Supreme Court on April 26, 1965, 33 L.W. 3349.

In rejecting the old scale of divisional factors, we found numerous deficiencies therein.[4] Those deficiencies

4. See, e.g., 325 I.C.C. at page 37.

were viewed in light of our conclusion that an adjustment is required to compensate the respective groups of carriers according to their expenditures in the joint effort of handling the interterritorial traffic in question. No one deficiency was found controlling. In so holding, we also rejected arguments that equal factor divisions should be maintained. 325 I.C.C. at page 27. To the extent the present divisions did not meet the foregoing test, they were found unjust, unreasonable, and inequitable. 325 I.C.C. at page 50. In our judgment, all other factors of section 15(6) being substantially equal, the divisional scales prescribed on the basis of restated cost proportions will produce divisions which we consider fair and equitable as between the parties. No other basis has been shown to be appropriate here. In any event, except for the Norfolk Southern, no carrier at any time has satisfactorily demonstrated a special situation which required special and separate treatment. Accordingly, considering the scales prescribed in light of the traffic and cost studies referred to in our prior report, and the record as a whole, we find nothing revenue-wise or in any other respect which would warrant a change in our findings as to railroads in either territory, individually or as groups. We affirm our prior findings and conclusions as warranted by the record.

COMMISSIONER MURPHY, dissenting in part:

I am in accord with the majority's findings that the basis agreed to between the official lines and the Norfolk Southern is reasonable and may be approved. I do not agree, however, that the record contains evidence of specific cost factors which would support the construction of the divisional scales prescribed in the prior report. In this regard, I adhere to my separate dissenting-in-part expression in that report.

COMMISSIONER TUGGLE did not participate.

It is ordered, That insofar as the prior report, 325 I.C.C. 1, involved traffic moving between points on the Norfolk Southern and points in official territory via the gateway of Norfolk, Va., the instant proceedings be, and they are hereby, reopened for reconsideration on the present record, and the effective date of the order herein, dated February 3, 1965, and served March 2, 1965, having been temporarily restrained by the United States District Court for the Eastern District of Louisiana, New Orleans Division, on April 12, 1965, in civil action No. 15454, Aberdeen and Rockfish R.R. Co., et al. *v.* United States, et al., be, and it is hereby, vacated and set aside insofar as said order requires prescription of scales of prorating factors applicable to said traffic.

It is further ordered, That the complainants, cross-complainants, defendants, and respondents, according as they participate in the transportation, be, and they are hereby, notified and required to establish on or before July 30, 1965, and thereafter to apply, divisions of joint all-rail interstate rates for the transportation of property on traffic originating or terminating on the lines of the Norfolk Southern Railway Company, and moving to or from points in official territory, via Norfolk, Va., determined as provided in the supplemental report on further consideration issued contemporaneously herewith and made a part hereof. Actual settlement on the basis of the new divisions shall be, and it is hereby, postponed pending decision of the three-judge statutory court on the pending application for interlocutory injunction, and thereafter shall be governed by and subject to the court's order granting or denying said in-

junction and any protective payback conditions which may be imposed therein.

It is further ordered, That our prior report and order herein, dated February 3, 1965, and served March 2, 1965, except as modified and amplified in said supplemental report on further consideration be, and it is hereby, affirmed in all respects and together with this order, subject to the above-mentioned restraining order of the court, shall continue in force until further order of the Commission.

By the Commission.

BERTHA F. ARMES,
Acting Secretary.

(SEAL)

Development of the unit costs underlying the divisional factor scales in columns 1, 2, and 6 of appendix

Line No.	Item	Source	North				
			Terminal	Way train	Thru train	Total line haul	Tota
	(1)	(2)	(3)	(4)	(5)	(6)	
1	F.D. costs—unadj. (on 325 I.C.C. at 25).	V.S. 40, table 6, p. 13 and exh. B corrected, p. 3.	$33,564,609	—	—	$136,052,934	$169,
	Platform adj. and way & thru train adj.						
2	Cost before adjustment	V.S. 40A, exh. G corrected, page 1 for terminal, page 2 for line haul.	33,564,609	—	—	135,397,990	
3	Cost after adjustment	V.S. 40A, exh. G corrected, page 2 for terminal, page 1 for line haul.	31,310,534	5,211,818	127,902,913	133,114,731	
4	Adjustments	Line 2 minus line 3	$—2,254,075	—	—	$—2,283,259	
5	Cost after adj. for switching and terminal companies.	V.S. 40A, exh. G, page 3 corrected	33,501,339	—	—	135,297,787	
6	Switching and terminal co. adjustment.	Line 2 minus line 5	—63,270	—	—	—100,203	—
7	Short line railroads (class II) adjustment.	See attachment hereto	—30,446	—	—	—7,279	
8	F.D. costs with four adjustments	Line 1 plus or minus lines 4, 6, and 7.	$31,216,818	—	—	$133,662,193	
9	Interchange, avg. per handling	Southern brief, page 146	$4.95	—	—	—	
10	Cars handled	V.S. 11, exh. 1, page 1	967,554	—	—	—	
11	Cost of interchange at gateways	Line 9 x line 10	+4,789,392	—	—	—4,789,392	
12	Subtotal	Line 8 plus or minus line 11	$36,006,210	—	—	$128,872,801	
13	Way and thru train percentage	Line 3 above	xxx	3.915%	96.085%	100.000%	
14	Way and thru train costs	Line 12, cols. 6 & 11, x line 13	xxx	$5,045,370	$123,827,431	—	
15	Costs, after train tonnage adustment.	V.S. 40A, exh. G, p. 7, corrected	—	—	120,614,461	—	
16	Costs, before train tonnage adjustment.	V.S. 40, exh. D, p. 1, corrected (table 10)	—	—	119,747,142	—	
17	Train tonnage, Pocahontas region	Line 15 minus line 16	—	—	$+867,319	—	
18	F.D. costs—adjusted (on 325 I.C.C. at 26).	Lines 12 and 14 plus 17	$36,006,210	$5,045,370	$124,694,750	—	$165
	Service units						
19	Route of movement ton-miles	Way train: V.S. 40, exh. D corrected, p. 4—total: V.S. 11, exh. 1, tab. B.	xxx	363,179,565	—	11,501,773,060	
20	Tons and short line ton-miles	V.S. 11, exh. 1, tab. B	28,055,720.7	—	—	10,125,161,202	
21	Circuity	Line 19 ÷ line 20	xxx	—	—	1.13596	
22	Short line ton-miles	Way; line 19 cols. 4 & 9 ÷ line 21—thru: line 20 minus way.	xxx	319,711,579	9,805,449,623	—	
23	Cwt. and short line cwt.-miles	Times 20	561,114,414	6,394,231,580	196,108,992,460	—	
24	Two interchanges for bridge traffic	Line 11, col. 3 times 2	$9,578,784	—	—	—	
	Unit costs (325 I.C.C. at 37)						
25	Interchange unrelated to distance	Line 24 ÷ line 23 (mills)	17.07	xxx	xxx	xxx	
26	Terminal, way train, and thru train	Line 18 ÷ line 23 (mills)	64.17	0.78905	0.63584	xxx	
27	Way train miles	On line 23: col. 4 ÷ col. 3 and col. 9 ÷ col. 8.	xxx	11	xxx	xxx	

APPENDIX

t costs underlying the divisional factor scales in columns 1, 2, and 6 of appendix C in prior report, 325 I.C.C. 1, 82

North					South				
Terminal	*Way train*	*Thru train*	*Total line haul*	*Total north*	*Terminal*	*Way train*	*Thru train*	*line haul*	*Total south*
(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)
$33,564,609	—	—	$136,052,934	$169,617,543	$21,520,444	—	—	$172,785,865	$194,306,309
33,564,609	—	—	135,397,990	—	21,520,444	—	—	172,423,048	—
31,310,534	5,211,818	127,902,913	133,114,731	—	21,066,771	10,548,593	158,279,225	168,827,818	—
$—2,254,075	—	—	$—2,283,259	—	$—453,673	—	—	$—3,595,230	—
33,501,339	—	—	135,297,787	—	21,847,448	—	—	173,135,654	—
—63,270	—	—	—100,203	—163,473	+327,004	—	—	+712,606	+1,039,610
—30,446	—	—	—7,279	—37,725	+302,795	—	—	+226,552	+529,347
$31,216,818	—	—	$133,662,193	—	$21,696,570	—	—	$170,129,793	—
$4.95	—	—	—	—	$3.14	—	—	—	—
967,554	—	—	—	—	967,554	—	—	—	—
+4,789,392	—	—	—4,789,392	—	+3,038,120	—	—	—3,038,120	—
$36,006,210	—	—	$128,872,801	—	$24,734,690	—	—	$167,091,673	—
xxx	3.915%	96.085%	100.000%	—	xxx	6.248%	93.752%	100.000%	—
xxx	$5,045,370	$123,827,431	—	—	xxx	$10,439,888	$156,651,785	—	—
—	—	120,614,461	—	—	—	—	—	—	—
—	—	119,747,142	—	—	—	—	—	—	—
—	—	$+867,319	—	—	xxx	xxx	xxx	xxx	xxx
$36,006,210	$5,045,370	$124,694,750	—	$165,746,330	$24,734,690	$10,439,888	$156,651,785	—	$191,826,363
xxx	363,179,565	—	11,501,773,060	—	xxx	840,353,018	—	15,625,355,583	—
28,055,720.7	—	—	10,125,161,202	—	28,055,720.7	—	—	14,332,240,646	—
xxx	—	—	1.13596	—	xxx	—	—	1.09022	—
xxx	319,711,579	9,805,449,623	—	—	xxx	770,810,495	13,561,430,151	—	—
561,114,414	6,394,231,580	196,108,992,460	—	—	561,114,414	15,416,209,900	271,228,603,020	—	—
$9,578,784	—	—	—	—	—	—	—	—	—
17.07	xxx	xxx	xxx	xxx	xxx	—	—	xxx	xxx
64.17	0.78905	0.63584	xxx	xxx	44.08	0.67720	0.57756	xxx	xxx
xxx	11	xxx	xxx	xxx	xxx	27	xxx	xxx	xxx

457

APPENDIX ATTACHMENT

Adjustment for class II (short line) costs

Line No.	Item (1)	Participation in Off.-Sou. traffic: 15 class II's exh. R-30 (2)	Participation in Off.-Sou. traffic: All class II's V.S. 36, exh. 4 (3)	Participation in Off.-Sou. traffic: Ratio col. (3) ÷ col. (2) (4)	Form A costs: 15 roads exh. R-30 (5)	Form A costs: All class II's col. (5) × col. (4) (6)	Witness Wooden* basic costs: 15 class II's V.S. 80, sec. D, exh. A (7)	Witness Wooden* basic costs: Ratio col. (7) ÷ col. (5) (8)	Witness Wooden* basic costs: All class II's col. (6) × col. (8) (9)	Adj. included in costs of Sou. lines col. (9) less col. (6) (10)
1	North of gateway:									
2	Cars	11,561	16,697	1.444252	$306,856	$443,177	—	—	—	—
3	Tons	342,197	490,926	1.434630	107,045	153,570	—	—	—	—
4	Terminal	—	—	—	—	596,747	—	—	$566,301	—$30,446
5	Car-miles	358,312	417,948	1.166436	35,178	41,033	—	—	—	—
6	Ton-miles	11,019,486	12,686,071	1.151240	88,280	101,631	—	—	—	—
7	Line-haul	—	—	—	—	142,664	—	—	135,385	—7,279
8	Total	—	—	—	537,359	739,411	$509,943	0.948980	701,686	—37,725
9	South of gateway:									
10	Cars	31,725	55,829	1.759779	538,056	946,860	—	—	—	—
11	Tons	1,027,923	1,839,072	1.789115	201,792	361,029	—	—	—	—
12	Terminal	—	—	—	—	1,307,889	—	—	1,610,684	+302,795
13	Car-miles	2,820,106	3,228,070	1.144663	163,320	186,946	—	—	—	—
14	Ton-miles	89,300,055	102,256,571	1.145090	691,318	791,621	—	—	—	—
15	Line-haul	—	—	—	—	978,567	—	—	1,205,119	+226,552
16	Total	—	—	—	1,594,486	2,286,456	1,963,632	1.231514	2,815,803	+529,347

* V.S. 37, pages 3-4 and appendix B therein.

APPENDIX D

A. Section 1(4) of the Interstate Commerce Act, 49 U.S.C. § 1(4), provides in pertinent part:

> It shall be the duty of every such common carrier establishing through routes . . . in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Section 15(6) of the Interstate Commerce Act, 49 U.S.C. § 15(6), provides:

> (6) Whenever, after full hearing upon complaint or upon its own initiative, the Commission is of opinion that the divisions of joint rates, fares, or charges, applicable to the transportation of passengers or property, are or will be unjust, unreasonable, inequitable, or unduly preferential or prejudicial as between the carriers parties thereto (whether agreed upon by such carriers, or any of them, or otherwise established), the Commission shall by order prescribe the just, reasonable, and equitable divisions thereof to be received by the several carriers, and in cases where the joint rate, fare, or charge was established pursuant to a finding or order of the Commission and the divisions thereof are found by it to have been unjust, unreasonable, or inequitable, or unduly preferential or prejudicial, the Commission may also by order determine what (for the period subsequent to the filing of the complaint or petition or the making of the order of investigation) would have been the just, reasonable, and equitable divisions thereof to be received by the several carriers, and require adjustment to be made in accordance therewith. In so prescribing and determining the divisions of joint rates, fares and charges, the Commission shall give due consideration, among other things, to the efficiency with which the carriers

concerned are operated, the amount of revenue required to pay their respective operating expenses, taxes, and a fair return on their railway property held for and used in the service of transportation, and the importance to the public of the transportation services of such carriers; and also whether any particular participating carrier is an originating, intermediate, or delivering line, and any other fact or circumstance which would ordinarily, without regard to the mileage haul, entitle one carrier to a greater or less proportion than another carrier of the joint rate, fare or charge.

B. Section 8(b) of the Administrative Procedure Act, formerly 5 U. S. C. § 1007(b) and now revised and codified as 5 U. S. C. § 557(c), (80 Stat. 387), provides:

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

Section 10(e) of the Administrative Procedure Act, formerly 5 U. S. C. § 1009(e), and now revised and codified as 5 U. S. C. § 706 (80 Stat. 393), provides:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutry right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX E.

LIST OF APPELLANTS

The Baltimore and Ohio Railroad Company
The Akron, Canton & Youngstown Railroad Company
The Ann Arbor Railroad Company
Bangor and Aroostook Railroad Company
Belfast and Moosehead Lake Railroad Company
Bessemer and Lake Erie Railroad Company
Boston and Maine Corporation
Boyne City Railroad Company
Canadian National Railways
Canadian Pacific Railway Company
Central Indiana Railway Company
The Central Railroad Company of New Jersey
(P. M. Shoemaker and John E. Farrell, Trustees)
Central Vermont Railway, Inc.
The Chesapeake and Ohio Railway Company
Chesapeake Western Railway
Chestnut Ridge Railway Company
Chicago & Eastern Illinois Railroad Company
Chicago & Illinois Midland Railway Company
Chicago South Shore and South Bend Railroad
Coudersport and Port Allegheny Railroad Company
The Delaware and Hudson Railroad Corporation
Detroit and Mackinac Railway Company
The Detroit and Toledo Shore Line Railroad Company
Detroit, Toledo and Ironton Railroad Company

Elgin, Joliet and Eastern Railway Company
Erie Lackawanna Railroad Company
Grand Trunk Western Railroad Company
Illinois Terminal Railroad Company
Indiana Harbor Belt Railroad Company
The Lehigh and Hudson River Railway Company
Lehigh Valley Railroad Company
The Long Island Rail Road Company
The Lorain & West Virginia Railway Company
Maine Central Railroad Company
Maryland and Pennsylvania Railroad Company
The Monongahela Railway Company
Monon Railroad
Morristown & Erie Railroad Company
The New York Central Railroad Company
The New York, New Haven and Hartford Railroad Company
(Richard Joyce Smith and William J. Kirk, Trustees)
New York, Susquehenna and Western Railroad Company
Norfolk and Western Railway Company
The Pennsylvania Railroad Company
Pennsylvania-Reading Seashore Lines
The Pittsburg & Shawmut Railroad Company
Pittsburgh & Lake Erie Railroad Company
Pittsburgh, Chartiers & Youghiogheny Railway Company
The Pittsburgh & West Virginia Railway Company
(Norfolk and Western Railway Company, Lessee)
Raritan River Rail Road Company
Reading Company
Richmond, Fredericksburg and Potomac Railroad Company

St. Johnsbury & Lamoille County Railroad
The Staten Island Rapid Transit Railway Company
Toledo, Peoria & Western Railroad Company
Wabash Railroad Company
(Norfolk and Western Railway Company, Lessee)
Western Maryland Railway Company
The Winfield Railroad Company